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In the

# Supreme Court of the United States.

October Term, 1930.

## No. 490.

**Frank L. Young,**
Petitioner,

v.

**McNeal-Edwards Company.**

On writ of certiorari to the United States Circuit Court of Appeals for the First Circuit.

## BRIEF FOR PETITIONER.

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In the

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OCTOBER TERM, 1930.

No. 490.

FRANK L. YOUNG COMPANY,

PETITIONER,

*v.*

McNEAL-EDWARDS COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

## BRIEF FOR PETITIONER.

### OPINIONS BELOW.

The majority opinion of the Circuit Court of Appeals upon rehearing, from which the petition for certiorari was directly prosecuted, appears at 42 F. (2d) 363 (R. 92-112). The dissenting opinion of Anderson, J., appears at 43 F. (2d) 99 (R. 112-114). The majority opinion sustained the defendant's objection to the jurisdiction, which had thrice been overruled in the District Court. The two memorandum opinions of Lowell, District Judge (R. 82), and the ruling of Morton, District Judge (R. 14-15), are unreported.

The first opinion of the Circuit Court of Appeals (now superseded), dealing with questions of contract on the merits, is reported in 35 F. (2d) 829 (R. 86-89).

## JURISDICTION.

The judgment of the Circuit Court of Appeals on rehearing was entered on July 1, 1930 (R. 92). By its judgment and in its opinion the Circuit Court of Appeals ruled that Massachusetts General Laws, chapter 227, sections 2 to 4, are inapplicable in the United States District Court for the District of Massachusetts, and that therefore the District Court had no jurisdiction of this action (R. 109). This petition was brought pursuant to Act of Congress of February 13, 1925, chapter 229, sections 1 and 8; United States Code, title 28, sections 347A and 350. The petition was filed September 29, 1930, and was properly brought within three months of the date of decision on rehearing.

*Morse* v. *United States*, 270 U.S. 151 (1926).
*Citizens Bank* v. *Opperman*, 249 U.S. 448 (1919).

Careful examination of the opinion of the Circuit Court of Appeals indicates the possibility of doubt whether that court decided that the Massachusetts statute was unconstitutional or merely that it was inapplicable in the Federal courts. We believe that the court decided merely that the statute was inapplicable in the Federal courts, even though the effect of this decision is to render the statute a dead letter. In view of the possibility of our being wrong in this belief, counsel for the petitioner directed an application for an appeal to Bingham, Circuit Judge. Judge Bingham's statement in denying the application apparently confirms our belief:

> "The question of the validity or constitutionality of the state statute is not presented in the case and was not decided. This being so, no right of appeal to the

Supreme Court exists and the application for an appeal is denied" (R. 114-115).

The petition for certiorari was allowed November 24, 1930 (R. 115).

## QUESTIONS PRESENTED.

(1) The respondent, a non-resident of Massachusetts, brought suit against the petitioner in the United States District Court for the District of Massachusetts. The petitioner brought the present cross-action against the respondent, relating to the same contract as the respondent's original action. In this cross-action the petitioner sought to obtain jurisdiction over the respondent by service upon his attorney of record in accordance with Massachusetts General Laws, chapter 227, sections 2 to 4. These sections read as follows:

"SECTION 2. If an action is brought by a person not an inhabitant of the commonwealth or who cannot be found herein to be served with process, he shall be held to answer to any action brought against him here by the defendant in the former action, if the demands are of such a nature that the judgment or execution in the one case may be set off against the judgment or execution in the other.* If there are several defendants in the original action, each of them may bring such cross action against the original plaintiff and may be allowed to set off his judgment against that which may be recovered against him and his co-defendants in like manner as if the latter judgment had been against him alone.

"SECTION 3. The writ in such cross action may be served on the attorney of record for the plaintiff in the original action, and such service shall be as valid and

* As to when executions may be set off, see General Laws, chapter 235, section 27, quoted and discussed *infra*, p. 20.

effectual as if made on the party himself in the commonwealth.

"SECTION 4. The court in which either of the actions is pending may order continuances to enable the absent party to defend the action brought against him, and to enable either party to set off his judgment or execution against that which is recovered against him, but the actions shall not be unreasonably delayed by the neglect or default of either party. The provisions of the following sections, relative to actions against persons absent from the commonwealth, shall not apply to a cross action brought under the two preceding sections."

The first and principal question is whether these sections are constitutional and applicable to actions in the District Court for the District of Massachusetts, and whether jurisdiction over the respondent could thus be obtained by service upon its attorney of record. This question is dealt with at pages 5 to 34 of this brief.

(2) If the court rules that the District Court was correct in applying the Massachusetts statute, and that the Circuit Court of Appeals was in error in reversing the District Court ruling, the respondent presses a question as to construction of the Massachusetts statute. The contention is that Frank L. Young Company cannot take advantage of the statute in this case because it previously brought and discontinued another action against McNeal-Edwards Company. This question is dealt with at pages 34 to 43 of this brief.

(3) If the court rules that the District Court had jurisdiction of this cause, the respondent presses a claim that judgment on the merits should have been rendered in its favor on the ground that Frank L. Young Company had committed an intentional breach of the contract upon which this action is based and was thereby precluded from recovery. This question is treated at pages 43ff. of this brief.

## FIRST QUESTION: APPLICABILITY OF MASSACHUSETTS STATUTE IN FEDERAL COURTS.

### STATEMENT OF THE CASE RELATING TO FIRST QUESTION.

At this point only those facts are stated which bear upon the first question—*i.e.*, the applicability of General Laws, chapter 227, sections 2 to 4, in the District Court for the District of Massachusetts. Additional facts bearing only on the other two questions will be found at pages 34 and 43 of this brief.

In January, 1922, the petitioner bought of the respondent about $18,000 worth of fish oil (R. 18-19) and undertook to return, freight prepaid, the drums in which the oil was shipped. Disputes arose as to the quality of the oil and the promptness with which the drums were returned. The respondent, a Virginia corporation, non-resident in Massachusetts, brought suit in the District Court for the District of Massachusetts to recover for alleged delay in returning the drums. Since the petitioner was a Massachusetts corporation, the respondent obtained personal jurisdiction. Thereupon the petitioner (discontinuing a similar suit in which property of insufficient value had been attached and was the sole basis of jurisdiction) brought the present cross-action to recover damages for defective quality of the oil in the District Court for the District of Massachusetts (R. 16-17). Under Massachusetts General Laws, chapter 227, sections 2 and 3, heretofore quoted, the petitioner caused process to be served upon respondent's counsel of record. Respondent's motion to dismiss and plea in abatement on the ground that jurisdiction was not thereby obtained were denied (R. 82). A verdict for $10,730.17 for the petitioner was rendered in the present action and a verdict for $100 in favor of the respondent in its action against the petitioner (R. p. 71). Respondent's motion in arrest of judgment on the ground that jurisdiction had not been obtained was denied (R. 14-15). On appeal, the Circuit Court of Appeals

for the First Circuit reversed the judgment and ordered judgment for the respondent on the ground that petitioner's unreasonable detention of the drums (which by the jury's verdict damaged respondent $100) as matter of law precluded any recovery by petitioner for respondent's breach of contract (R. 86-89). A petition for rehearing on the ground that the decision of the Circuit Court of Appeals was unsupported either by the record or by the law (R. 90-91) was granted (R. 92). After reargument the Circuit Court of Appeals ordered the case dismissed for want of jurisdiction,* on the ground that General Laws, chapter 227, sections 2 to 4, were inapplicable to proceedings in the District Court for the District of Massachusetts (R. 92-112). Anderson, Circuit Judge, dissented (R. 112-114). This second decision of the Circuit Court of Appeals by a divided court raises the first and principal question of this case.

It should be added that the idea that these statutes are inapplicable in this proceeding is entirely original with the two majority judges of the Circuit Court of Appeals. "From time immemorial" (R. 112) these statutes have been applied in the District Court for the District of Massachusetts and their application acquiesced in, at least tacitly, by the Circuit Court of Appeals for the First Circuit. Neither counsel questioned the applicability of these statutes.

## SPECIFICATION OF ERRORS.

Petitioner claims that the Circuit Court of Appeals for the First Circuit erred—

First, in holding that Massachusetts General Laws, chapter 227, sections 2 and 3, are not applicable to actions in the United States District Court for the District of Massachusetts.

Second, in refusing to follow the interpretation of said statute by the highest court of the Commonwealth of Massa-

* Of course the judgment of dismissal was a final disposition of the litigation, since the statute of limitations had run on the cause of action.

chusetts, which has declared it to be a part of the law of set-off and counterclaim.

## SUMMARY OF ARGUMENT ON FIRST QUESTION.

The petitioner contends that the practice of the District Court for the District of Massachusetts "from time immemorial" (R. 112) in applying the Massachusetts statute in question to proceedings in that court is correct.

The statute provides for a constitutional exercise of jurisdiction. By invoking the jurisdiction of the courts of a sovereign, a plaintiff submits to the jurisdiction of those courts with reference to cross-claims of the person sued. That the cross-claim is prosecuted by a separate service of process rather than by a counterclaim in the same proceeding is a matter of procedural convenience not touching the power of the sovereign. The method of service upon counsel of record, provided by the statute, is reasonably calculated to afford notice of the cross-claim. In equity substituted service of cross-bills upon complainant's attorney has long been familiar.

The statute, as a provision for service of process, is part of the "practice and forms and modes of proceeding in civil causes" of Massachusetts and is thus incorporated into the practice of the District Court for the District of Massachusetts by the Conformity Act.

More particularly, the statute is part of the Massachusetts procedural system of set-off and counterclaim. Except for the rare case in which the cross-claims are both liquidated, the Massachusetts statutes have no provision for set-off or counterclaim *within the same action* with right of affirmative judgment for the defendant. Other types of cross-claims (including the types existing between the parties to this proceeding—*i.e.*, unliquidated claims arising out of the same transaction) are provided for by cross-actions with separate docket entries, followed by set-off of the ex-

ecutions obtained therein. The statute in question provides for such cross-actions and set-off of executions in the case of non-residents. As part of the state law of set-off and counterclaim, it becomes part of the practice of the District Court in Massachusetts under the Conformity Act. If this statute does not become part of such practice, the United States District Court for the District of Massachusetts is administering a system of set-off and counterclaim more incomplete and archaic than that of any other Anglo-American jurisdiction.

The two majority judges of the Circuit Court of Appeals, in ruling that this statute was inapplicable in the Federal courts, misunderstood the nature of the Massachusetts statutes (neither of these judges is from Massachusetts; the single Massachusetts member on the court dissented) and misconstrued the decisions of this Court declaring that state legislation cannot enlarge or abridge the jurisdiction of the Federal courts.

## ARGUMENT ON FIRST QUESTION.

### I.

### The Massachusetts Statute is Constitutional.

As heretofore pointed out (*supra*, p. 2) the Circuit Court of Appeals has expressly declared that it did not decide that the Massachusetts statute was unconstitutional (R. 114-115). But doubts as to the constitutionality of these statutes expressed in the majority opinion (R. 109) render brief discussion of the constitutional question appropriate.

The statute declares that where a non-resident brings suit within the jurisdiction he thereby becomes liable to an action brought by the defendant whom he has sued, provided that the executions in the two actions can be set off against each other. The only effect of this proviso is to require that both actions deal with the same persons in the same capacities. Thus if the defendant were sued as trustee or execu-

tor, he would not be entitled to bring a cross-action in his personal capacity.

*Holbrook* v. *Lackey*, 13 Metc. 132, 135 (1847).

Apart from this limitation, the statute subjects the non-resident plaintiff to all cross-claims of the defendant, whether or not liquidated, and whether or not arising out of the same transaction. It is prescribed that service of process in this cross-action shall be upon the non-resident's attorney of record.

*Due Process.* The Circuit Court of Appeals seemed to conclude that, on the authority of *Riverside Mills* v. *Menefee*, 237 U.S. 189 (1914), these sections violated the due-process clause of the Fourteenth Amendment by sanctioning an unconstitutional exercise of jurisdiction by Massachusetts courts. Of course, if the Circuit Court of Appeals is right, the statute cannot be applied even in the state courts of Massachusetts, and the decision of Mr. Justice Holmes, then Chief Justice of Massachusetts, in *Aldrich* v. *Blatchford*, 175 Mass. 369 (1900), upholding the statute as constitutional was wrong. And the following statutes of other states also fall:

Revised Statutes of Maine, 1930, c. 95, §85.
General Laws of Rhode Island, §§ 4927-4929 (c. 338, §§ 14-16).
Alabama, Civil Code, §10181.
California, Code of Civil Procedure, §1015.
Idaho, Compiled Statutes, 1919, §6699.
See *Collins* v. *Brown*, 19 Idaho, 360, 364 (1911).
Montana, Code of Civil Procedure, §9151.

We are convinced that the statute is constitutional. Where a person, even a non-resident, invokes the jurisdiction of the courts of a sovereign against a defendant, it has always been recognized that, if the statutes of the forum so

provide, an affirmative money judgment against the non-resident may be rendered in favor of the defendant upon any cross-claim the defendant may possess. The basis of this jurisdiction of a sovereign over suitors in its courts has been stated in this Court and elsewhere.

> "By setting up its counterclaim the defendant became a plaintiff in its turn, invoked the jurisdiction of the court in the same action and by invoking submitted to it. . . . the defendant, if he elects to sue upon his claim in the action against him, assumes the position of an actor and must take the consequences."
>
> Per Holmes, J., in *Merchants Heat & Light Co.* v. *Clow & Sons*, 204 U.S. 286, 289, 290 (1907).

See also *American Mills Co.* v. *American Surety Co.*, 260 U.S. 360, 366 (1922).

> "When it brings suit in a court administering a procedure which admits of the filing of counterclaims, it is also prima facie subject to the jurisdiction of that court as respects any counterclaims permitted under its practice. To file the action is to accept the consequences which it may have in the place where it is filed, including such affirmative relief as is there allowed."
>
> Per Learned Hand, D.J., in *Kunglig Jarnvagsstyrelsen* v. *Dexter & Carpenter*, 300 Fed. 891, 892 (S.D. N.Y. 1924).

"SECTION 89. JURISDICTION OVER PLAINTIFF.

"A plaintiff by bringing an action in a state subjects himself to the jurisdiction of the state as to the claim sued upon, and, if the law of the state so provides at the time the plaintiff brings his action, as to any set-off, counterclaim or cross-action brought against him by the defendant.

COMMENTS:

. . . . . .

"c. A state may provide that a non-resident who brings an action in a court of the state shall be held to answer to any action brought against him by the defendant. A judgment rendered against such a non-resident in such a cross-action is valid whether rendered by the same court in which he brought the original action or by another court of the same state, and although he was not otherwise subject to the jurisdiction of the state.

"The rendition of such a judgment by a court of a State is not a violation of the Fourteenth Amendment to the Constitution of the United States."

American Law Institute, Restatement of the Law of Conflict of Laws (1930).

This basis of jurisdiction has been fully recognized in the Roman Law and modern Civil Law.

Code, 7.45.14. Cf. Dig. 2.1.11.1; 5.1.2.5.

Civilprozessordnung (German Republic, 1924), §33. 3, Glück, Ausfürliche Erläuterung der Pandecten nach Hellfeld, ein Commentar, §§ 204-207.

Appleton, Histoire de la Compensation en Droit Romain, 222-223.

Even a sovereign suing in his own courts may be compelled to do full justice to the defendant who holds a cross-claim.

*United States* v. *The Thekla*, 266 U.S. 328, 339 (1924).

*The Gloria*, 286 Fed. 188 (S.D. N.Y. 1923).

Compare:

*The Newbattle*, 10 P.D. 33 (1885).

*Duke of Brunswick* v. *King of Hanover*, 6 Beav. 1, 37, 38 (1844).

Beale, Jurisdiction over Foreigners, 26 Harv. L. Rev. 283, 298-299.

This Court has already sanctioned set-off and counterclaim statutes which permit the defendant to assert cross-claims not arising out of the same transaction—

*Dushane* v. *Benedict,* 120 U.S. 630 (1877);
*Pacific Express Co.* v. *Malin,* 132 U.S. 531, 537 (1889);
*Higgins* v. *McCrea,* 116 U.S. 671, 684 (1886)—

as well as the usual statutes permitting affirmative judgments for the defendant—

*Clement* v. *Field,* 147 U.S. 467 (1892);
*Railroad* v. *Smith,* 21 Wall. 255 (1874)—

and cases allowing recoupment for tort in contract actions.

*Dushane* v. *Benedict, supra.*

In all of these cases the actual set-off or counterclaim before the Court arose out of the same transaction as the plaintiff's claim, although the statutes permitted assertion of cross-claims not so arising. In the fact that these cases make less broad use of the statutes than would have been possible, they resemble the case now before the Court.

It is particularly noteworthy that in *Higgins* v. *McCrea, supra,* this Court was dealing with an Ohio statute (Throckmorton's Code, 1930, §11,337), which provided that upon motion of either party the counterclaim could be turned into a separate suit, and that in the opinion of Woods, J., at p. 683, the reasoning of the Court is based upon the fact that the Ohio counterclaim is in substance a distinct cross-action.

The only difference between a broad counterclaim statute in the orthodox form (whose constitutionality would scarcely be contested) and the Massachusetts statute here in question is that in Massachusetts the cross-claim proceeds upon

a separate service of process and results in a separate judgment. Where the plaintiff could be forced to defend a counterclaim pleaded to his action, the mere fact that the foundation for the counterclaim is laid by a separate service instead of a pleading in the original action does not touch the power of the court to adjudicate the claim. This concerns only the method in which the court exercises the power it has.

> "If a State law provided that in all cases all cross demands should be open, an entirely possible piece of legislation, no one would doubt the constitutionality of the law. No service would be necessary in order to entitle the defendant to judgment if on a general taking of accounts he came out ahead. We do not suppose that the legislation would be any worse if it made service of a writ on the plaintiff's attorney a condition of the cross judgment."
>
> Per Holmes, C.J., in *Aldrich* v. *Blatchford & Co.*, 175 Mass. 369, 372 (1900).

Of course, no reliance is placed upon cases justifying the exercise of jurisdiction over foreign corporations in whole or in part upon the ability to exclude the foreign corporation.

> *Pennsylvania Fire Insurance Co.* v. *Gold Issue Mining Co.*, 243 U.S. 93, 96 (1917).
>
> Cf. *Hess* v. *Pawloski*, 274 U.S. 352, 356 (1927).

Plainly, there is no power to exclude foreign corporations from the Federal courts. Moreover, the Massachusetts statute here in question should be justified on grounds applicable equally to individuals and corporations.

It being established that the sovereign whose jurisdiction is invoked by the non-resident plaintiff has jurisdiction over him with reference to cross-claims, the method of exercise of the jurisdiction provided by the statute in question is rea-

sonable. Notice to or service upon his attorney of record is obviously calculated to bring the cross-claim to the attention of the non-resident. Such substituted service has long been the accepted practice in equity in the Federal courts with reference to cross-bills; and this practice has never been questioned on constitutional grounds.

*Gasquet* v. *Fidelity Trust Co.*, 57 Fed. 80 (1893, 5th C.C.A.).

*Kelley* v. *Smith Co.*, 196 Fed. 466 (1912, 7th C.C. A.).

See also:

*Chesapeake & Ohio Ry. Co.* v. *Swayze*, 60 N.J. Eq. 417 (1899), per Pitney, V.C.

*Collins* v. *Brown*, 19 Idaho, 360, 364 (1911).

*Equal Protection of the Laws.* The Circuit Court of Appeals has further suggested (R. 110-111) that the Massachusetts statute unconstitutionally discriminates against non-residents in that where there are several defendants it permits cross-actions by each of the defendants, whereas similar rights are not given against resident plaintiffs. It is sufficient to say that if this statute is invalid in cases in which several defendants are sued (which is by no means conceded), such invalidity would have no effect upon the application of the statute to the instant case, where there is a single defendant. If a provision as to several defendants is invalid, it is plainly severable, and this defendant can obtain no advantage through asserting the constitutional right of some hypothetical defendant of the future.

It might occur to the Court that the provision for service of process upon the non-resident's attorney is discriminatory, since similar rights are not given against residents. It should suffice to point out that in Massachusetts jurisdiction over a resident can always be obtained, even though he be outside the jurisdiction, by service of process at his last and usual place of abode. General Laws, chapter 223,

section 31. It is the inapplicability of this section to non-residents (General Laws, chapter 227, section 1) that requires some similar procedural remedy against non-resident plaintiffs. This the statute in question affords.

## II.

**The Massachusetts Statute Prescribes a Method of Service of Process, and as Such is Applicable in the Federal Courts in Massachusetts under the Conformity Act.**

The Conformity Act, U.S. Code, title 28, §724, provides that:

> "The practice, pleadings, and forms and modes of proceeding in civil causes, . . . in the District Courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such District Courts are held."

It has always been held that state practice as to service of process is adopted for the Federal courts by the Conformity Act.

> "With regard to the mode of serving mesne process upon corporations and other persons, Congress has not laid down any rule; and hence the state law and practice must be followed. There can be no doubt, we think, that the mode of service of process is within the categories named in the act. It is part of the practice and mode of proceeding in a suit."
>
> *Amy* v. *Watertown*, 130 U.S. 301, 304 (1889).

> "The laws of the State providing for the service of process of the state courts in actions at law furnish the rules for procedure in such cases in this court, so that whatever would be lawful service of process to bring

a party into court, if the action were in a court of competent jurisdiction under the state government, is lawful and sufficient for the purpose in actions commenced in this court."

*VanDresser* v. *Oregon Railroad &c. Co.*, 48 Fed. 202, 205 (C.C. Wash. 1891).
*McCullough* v. *United Grocers' Corporation*, 247 Fed. 880, 882 (N.D. Ohio, 1918).
3 Foster, Federal Practice (6th ed.), §455A.

This adoption is not limited to state statutes providing for the usual personal service of process in hand, but extends to such substituted service as a state practice, within the bounds of constitutionality, may prescribe.

*King* v. *Davis*, 137 Fed. 198 (W.D. Va. 1903).

Of course if a state practice as to service of process is based upon insufficient jurisdiction over the defendant, or if the service of process is not reasonably calculated to give notice of the proceeding to the defendant, the practice is unconstitutional and inapplicable in either Federal or state courts.

*Riverside Mills* v. *Menefee*, 237 U.S. 189 (1914).
*Goldey* v. *Morning News*, 156 U.S. 518 (1894).

But subject to these constitutional restrictions, applicable equally in all courts, state practice with regard to service of process is adopted in gross for the Federal courts by the Conformity Act.

It has already been argued (*supra*, pp. 8-15) that the Massachusetts statute is constitutional. If so, the Conformity Act requires its application in the District Court for the District of Massachusetts. It has, in fact, been so applied "from time immemorial" (R. 112).

*Arkwright Mills* v. *Aultman & Taylor Co.*, 128 Fed. 195 (1904).

*Colman* v. *American Warp &c. Co.*, 235 Fed. 531, 536 (1915).

*E. R. Sherburne Co.* v. *Wellenstein, Krause & Co.*, 285 Fed. 793 (1923).

*Huntington Manufacturing Co.* v. *Bradford Worsted Spinning Co.*, 37 F. (2d) 730 (1915).

## III.

**The Statute is Part of the Massachusetts Procedural System of Set-Off and Counterclaim and as Such is Adopted for the District Court for the District of Massachusetts by the Conformity Act.**

It is significant that every Massachusetts judge or former Massachusetts lawyer who has expressed an opinion with regard to this statute has declared or implied that it was part of the law of set-off and counterclaim of Massachusetts.

*Arkwright Mills* v. *Aultman & Taylor Co.*, 128 Fed. 195 (1904), per Francis Lowell, D.J.

*Aldrich* v. *Blatchford*, 175 Mass. 369 (1900), per Holmes, C.J.

*McNeal-Edwards Co.* v. *Frank L. Young Co.*, 43 F. (2d) 99 (1930) (R. 112, 113), per Anderson, J., dissenting.

The only judicial minds thus far to express a doubt on this point are the majority judges of the Circuit Court of Appeals, who hail respectively from New Hampshire and Maine. One is led to suspect that their view may be connected with an incomplete understanding of the procedural system of which this statute is a part—particularly where, as here, the point was raised by the court *ex proprio motu* without the aid which argument from either counsel might have given.

We believe that the statute in question is part of the Massachusetts law of set-off and counterclaim. We do not think

that this contention is essential to our argument for the application of the statute in the District Court, since we believe that the very simple argument already made, based upon *Amy* v. *Watertown*, 130 U.S. 301, is sufficient; but we do feel that its applicability is clearer, and the results of non-applicability more strikingly undesirable, if the relation between these sections and the law of set-off and counterclaim in Massachusetts is pointed out. For this reason we undertake to set before the Court in some detail the system of cross-claim procedure of which General Laws, chapter 227, sections 2 to 4, are an integral part.

*Recoupment.* In Massachusetts common-law recoupment is recognized. It has no statutory sanction. The matters set up in recoupment must arise out of the same transaction.

> *Home Savings Bank* v. *Boston*, 131 Mass. 277, 280 (1881).
>
> *Barlow Manufacturing Co.* v. *Stone*, 200 Mass. 158, 160 (1908).
>
> *Knitted Mattress Co.* v. *Griggs*, 154 Mass. 5 (1891).

No affirmative judgment for the defendant is possible.

> *Barnett* v. *Loud*, 226 Mass. 447, 450 (1917).

See also General Laws, c. 106, §58 (1A).

*Set-Off.* This is, as usual, a statutory matter in Massachusetts. Set-off is permitted only if the plaintiff's claim and the defendant's claim are both liquidated and both constitute contract claims for goods sold, money paid, money had and received, or services performed.

> "If at the commencement of an action upon a judgment or upon a contract, express or implied, for property sold, for money paid, for money had and received, for services performed and for an amount which is liquidated or may be ascertained by calculation, the de-

fendant has in his own right a claim against the plaintiff such as is hereinbefore mentioned or such a claim which has been assigned to him with notice thereof to the plaintiff, it may be set off against the plaintiff's claim as hereinafter provided."

General Laws, c. 232, §1.

By section 11 of the same chapter an affirmative judgment in favor of the defendant is permitted. Plainly, the cases in which such set-off is possible are comparatively rare. The requirement of two liquidated claims of these restricted natures is extraordinarily strict.

*Counterclaim by Cross-Action.* (*a*) *Residents.* There is no other statute in Massachusetts permitting set-off or counterclaim in the same action. Of course this does not mean that Massachusetts is laboring under a procedural system of the wooden rigidity of General Laws, chapter 232, section 1. In Massachusetts practice cross-claims, for by far the greater part, are prosecuted by instituting cross-actions and then setting off the executions obtained in the two actions. Where the original plaintiff is a resident of the Commonwealth, the courts of the Commonwealth have jurisdiction over him by reason of such residence, even though he be outside the Commonwealth, and the statutes provide that process in actions against him may be served by leaving a copy at his last and usual place of abode or with his agent or tenant.

"If the summons is not served personally on the defendant, the original or a copy, as the case may be, shall be left at his last and usual place of abode, if he has any within the commonwealth known to the officer. If he has none, it shall be left with his tenant, agent or attorney, if he has any within the commonwealth known to the officer."

General Laws, c. 223, §31.

If he has no last and usual place of abode, or agent or tenant, in the Commonwealth, service is authorized in such manner as the court may direct, usually by mail and/or publication.

> "If a defendant . . . is absent from the commonwealth . . . and no personal service has been made on him . . . the court . . . shall order the action to be continued until notice of the action is given in such manner as it shall order."
>
> General Laws, c. 227, §7.
> Cf. General Laws, c. 223, §34.

When judgments and executions are obtained these are set off against each other.

> "Executions between the same parties may, if required by either party, be set off one against the other."
>
> General Laws, c. 235, §27.

The Court has power to stay the earlier judgment or execution until the later is obtained, in order that set-off may be effected.

> *Adams* v. *Manning*, 17 Mass. 178, 180 (1821).

Thus, plainly, the holder of a cross-claim who is sued by a resident of Massachusetts in the courts of the Commonwealth will always be able by cross-action to obtain judgment on his claim and set off the execution against that obtained by the resident.

*Counterclaim by Cross-Action. (b) Non-Residents.* With regard to non-resident persons generally, the non-personal service authorized by General Laws, chapter 223, section 31, and General Laws, chapter 227, section 7, would of course be ineffective for want of jurisdiction.

> *Pennoyer* v. *Neff*, 95 U.S. 714 (1877).
> General Laws, c. 227, §1.

However, the completeness of the Massachusetts system of counterclaim requires a statute subjecting non-residents to cross-actions brought by defendants whom they have sued. Such a statute was enacted in 1823 (Acts of 1823, c. 118), now General Laws, chapter 227, sections 2 to 4, the sections in question in this case. They provide (§2) that where an action is brought by a non-resident he shall be liable to cross-actions brought by the person sued. The statute then provides (§3) for service of process upon the non-resident's attorney of record—a device calculated to give to the non-resident prompt and expert notice of the bringing of the cross-action. It is then provided (§4) that the executions in the cross-actions may be set off against each other, and that, if one party threatens to obtain an execution before the action of the other party has arrived at final judgment, execution may be stayed to permit effective set-off. The essential nature of this statute as part of counterclaim procedure is indicated by two provisions: (*a*) Under section 2 only such cross-actions can be brought as will result in executions which can be set off against each other. (*b*) Under section 4 the execution in either suit may be stayed pending the obtaining of an execution in the other suit. Plainly, the purpose of the cross-actions is to give the right of counterclaim, and the method of obtaining execution is adapted to counterclaim functions.

In any system of counterclaim procedure the essential requirement is that that party alone shall receive payment who, on a taking of mutual accounts, is the creditor. The essential injustice to be avoided by any such system is the possibility that that party may obtain a payment who, on a taking of mutual accounts, is really the debtor. To obtain this result and prevent this injustice it is only essential that the *final payment* be so regulated that it shall be received only by the party entitled to a balance. It is quite immaterial whether the cross-claims are prosecuted under a single

docket number or under separate docket numbers, under a single set of pleadings or two sets, even in one court rather than in two courts, provided that the net result is a single payment in favor of him who is the substantial creditor.

The orthodox counterclaim system joins the two claims *ab initio*. This has its inconveniences. Both claims may be exceedingly complex and quite distinct; if they are part of the same suit, all issues must be tried together, with resultant possibility of confusion to the jury. In the event of appellate proceedings as to one claim, difficulties of separation and possibilities of unnecessarily large records are inherent. And there are others. Taking all things into consideration, the Massachusetts legislature has found it more convenient to link the cross-claims only at the point of execution and to treat them as independent up to that point. Where, as here, the trial together of the two claims is convenient, the cases are consolidated for trial. The states whose statutes are listed on page 9, *supra*, have seen fit to follow the example of Massachusetts at least with reference to non-residents.

The Ohio statute, treated in *Higgins* v. *McCrea*, 116 U.S. 671, is a compromise between the orthodox counterclaim system and the Massachusetts system. It requires the counterclaim to be commenced in the same action with the original suit, but then permits separation of the claims into two suits on the motion of either party. Perhaps the Ohio statute is the missing link which indicates the substantial connection between orthodox counterclaim statutes and the Massachusetts statutes here considered.

It may be noteworthy that in the Index to the Massachusetts General Laws, officially prepared (see "Foreword" to Index Volume and Mass. Acts of 1922, c. 197), the statutes here in question are indexed under "Set-Off." In Rhode Island the identical statute is juxtaposed in the same chapter to the section on set-off.

General Laws, Rhode Island, §§4927-4929.

The identical Maine statute has been recognized to be part of the law of set-off and counterclaim—

*New Haven Copper Co.* v. *Brown*, 46 Me. 418 (1859)—

and has been so declared by the very Circuit Court of Appeals from whose contrary opinion on the Massachusetts statute this appeal is taken.

*Champlin Refining Co.* v. *Gasoline Products Co.*, 29 F. (2d) 331, 338 (1928).

With these considerations in view, the language of Judge Francis Lowell in 1904 seems clearly justified:

> "The intent of the statute was discussed in *Aldrich* v. *Blatchford*, 175 Mass. 369, in which case the Supreme Court of Massachusetts held it constitutional. The decision was rested upon two grounds: . . . Second. The statute is an extension of the right of set-off. This appears plainly both from the language and history of the law. See St. Mass. 1823, c. 118; Report of the Commissioners on the General Statutes of the Commonwealth (1832), Part 3, Page 82. In matters of set-off the Federal courts follow the laws of the state, provided the distinction between law and equity is not lost sight of. . . . If the statute be treated as an enlargement of the right of set-off, the method of service provided is unobjectionable."

*Arkwright Mills* v. *Aultman & Taylor Machinery Co.*, 128 Fed. 195, 196 (1904).

Consider for a moment the result of the Circuit Court of Appeals' ruling that these statutes are inapplicable in the District Court in Massachusetts. Preservation and exten-

sion of the right of set-off and counterclaim has always been the especial solicitude of Federal courts.

> "It would be a most pernicious doctrine to allow a citizen of a distant State to institute in these courts a suit against a citizen of the State where the court is held and escape the liability which the laws of the State have attached to all plaintiffs of allowing just and legal set-offs and counterclaims to be interposed and tried in the same suit and in the same forum."
>
> *Partridge* v. *The Insurance Company*, 15 Wall. 573, 580 (1872).
>
> *Chicago & N.W. Ry.* v. *Lindell*, 281 U.S. 14, 17 (1930).

> "Recognition is just beginning to be given to the fact that the right [i.e. of counterclaim] as between litigants is something more than a procedural convenience and is really a requirement of substantial justice . . . a modern court should strive to do complete justice; a partial and incomplete adjudication tends only to protract and complicate litigation to the detriment of all concerned."
>
> Per Mack, J., in *The Gloria*, 286 Fed. 188, 192 (1923).

> "The right [of counterclaim] . . . being found conducive to the administration of justice, has been greatly extended by legislative enactments and a liberal construction by the courts . . . by the exercise of this equitable jurisdiction the courts are enabled to do justice between the parties in cases not strictly within the provisions of the statute."
>
> Per Anderson, J., in *Champlin Refining Company* v. *Gasoline Products Company*, 29 F. (2d) 331, 338 (1st C.C.A. 1928).

Yet if the Circuit Court of Appeals is right, the District Court for the District of Massachusetts is administering a procedure of set-off and counterclaim that has made no advance since the antique statutes permitting set-off of liquidated claims were first enacted. More particularly with reference to this case, the District Court is administering a system which prevents simultaneous litigation, in the same court, of claims arising out of the same transaction, and permits, as here, a non-resident entitled to $100 on his claim to obtain an enforceable execution against a resident who on a mutual accounting is the creditor in the net amount of over $10,000. And this while the State courts of concurrent jurisdiction are administering a thoroughly liberalized modern counterclaim procedure.

Worse still: If the Circuit Court of Appeals is right, the effectiveness of this statute in the State courts of Massachusetts is destroyed wherever the amount in controversy is or can be made to seem $3000. For, assured of protection against cross-claims in the Federal courts, no non-resident will henceforth resort to the State courts for relief. The resulting increase in diversity-of-citizenship cases in the District Courts might be substantial.

## IV.

### The Application of General Laws, Chapter 227, Sections 2 to 4, in the District Court does Not Improperly Enlarge the Jurisdiction of the Federal Courts.

The majority opinion in the Circuit Court of Appeals rules that these statutes in permitting suit against a non-resident plaintiff to be based upon service of process upon his attorney of record "would enlarge the jurisdiction of the Federal court in the District of Massachusetts as to suits brought against the non-resident by doing away with the requirement of personal service of process and substituting in its place the constructive service provided for

in the State statute" (R. 109). The court arrives at this conclusion on the authority chiefly of *Mexican Central R.R.* v. *Pinckney,* 149 U.S. 194 (1893), *Southern Pacific Co.* v. *Denton,* 146 U.S. 202 (1892), and *Goldey* v. *Morning News,* 156 U.S. 518 (1895) (R. 102). We now proceed to analyze this theory.

First, what is the jurisdiction of the District Court for the District of Massachusetts which, as is alleged, has been "enlarged"? The Acts of Congress dealing with this question are only three: Section 24 of the Judicial Code (U.S. Code, title 28, sec. 41) requires that the suit be between citizens of different states, and that the matter in controversy exceed $3000, exclusive of interest and costs. Section 51 of the Judicial Code (U.S. Code, title 28, sec. 112) provides that "where the jurisdiction is founded only on the fact that the action is between citizens of different states, suits shall be brought only in the district of the residence of either the plaintiff or the defendant." With regard to service of process, Revised Statutes, section 787 (U.S. Code, title 28, sec. 503), gives authority to marshals to make service "throughout the district" in which they were appointed.

No one contends that any one of these statutory provisions is violated by the proposed application of General Laws, chapter 227, sections 2 to 4, in this case. The suit is between citizens of different states. It does involve more than $3000. It is brought in the district where the plaintiff resides. And in making service upon the attorney of record for McNeal-Edwards Company the United States marshal did not have to go out of his district.

Where, then, the "enlargement" of Federal jurisdiction? Says the court (R. 109): "by doing away with the requirement of personal service of process and substituting in its place the constructive service provided for in the state statute." Yet *every* State statute providing for service of process "enlarges" Federal jurisdiction in precisely the same way. There is no Federal statute prescribing the method

of service of process. That is left entirely to state practice under the Conformity Act.

*Amy* v. *Watertown*, 130 U.S. 301 (1889).

Thus the Massachusetts statute providing for service of process by delivering a copy of the process in hand to the defendant within the Commonwealth (General Laws, c. 223, sec. 29) "enlarges" the jurisdiction of the District Court for the District of Massachusetts beyond what it would be in the absence of that statute. No greater "enlargement" is involved in General Laws, chapter 227, section 3, the statute here under consideration. The "enlargement" is in a different direction; but, provided the statute is constitutional, this is immaterial.

Of course there is a certain field for discretion in the Federal courts implied in the "as near as may be" clause of the Conformity Act. This has been interpreted as permitting the Federal courts to disregard "state statutes which, in their judgment, would unwisely encumber the administration of the law, or tend to defeat the ends of justice."

*Indianapolis & St. Louis R.R. Co.* v. *Horst*, 93 U.S. 291-301 (1876).

Enough has already been said as to the position of this statute in the Massachusetts procedural system to indicate that these sections cannot be brought within this classic definition. If we are right about this, there remain only two alternatives: (1) to declare that this statute represents an unconstitutional attempt on the part of the Commonwealth of Massachusetts to exercise jurisdiction over persons who are not subject to its power, or (2) to apply the constitutional Massachusetts statute with reference to service of process in the Federal courts in the District of Massachusetts. The constitutional aspects of the problem have already been argued. It is submitted that the second

alternative is alone open, and that the statute could be applied.

*Analysis of Authorities Cited by Court Below.* The Circuit Court of Appeals mustered an imposing array of authority to support its view. The great reliance placed by Bingham, J., upon these cases justifies a more detailed analysis than would otherwise be appropriate. The cases will be considered *seriatim* as discussed in the Lower Court opinion.

SOUTHERN PACIFIC COMPANY *v.* DENTON, 146 U.S. 202 (1892)
and
MEXICAN CENTRAL RAILROAD *v.* PINCKNEY, 149 U.S. 194 (1893)
(R. 103-104).

These two cases involved substantially the same question and may be treated together. The question concerned the applicability in the Federal courts sitting in Texas of a Texas statute providing that an appearance on behalf of a defendant, although in terms limited to the purpose of objecting to the jurisdiction of the court, should constitute a general appearance and a waiver of immunity from jurisdiction. This statute as applied in State courts had already been held constitutional in *York* v. *Texas*, 137 U.S. 15 (1890), which decision was later reaffirmed with reference to a Kentucky statute in *Western Indemnity Company* v. *Rupp*, 235 U.S. 261 (1914).

In the *Denton* case the Court pointed out (p. 209) that conformity to state practice was required only "as near as may be," and therefore that this statute would not be applied in the Federal courts because manifestly unfair and obstructive of the administration of justice. In the *Pinckney* case the same reasoning was relied upon (p. 207), but the Court further pointed out (p. 208) that the Texas statute if applied in the United States District Courts, would defeat the operation of Acts of Congress which confer upon litigants in the Federal courts the right to have the juris-

diction of such courts reviewed by the Supreme Court of the United States.

The state statute under consideration in the *Denton* and *Pinckney* cases, if enforced in the Federal courts, would have released all restrictions on the jurisdiction of those courts. It provided that the mere action of a litigant in raising a jurisdictional question constituted a submission by that litigant to the jurisdiction of the court and a waiver of any right to obtain review of jurisdictional issues in the Supreme Court of the United States. The essence of Federal jurisdiction is its limited character—limited as to subject-matter, as to parties, and as to venue. The Texas statute, if applied, would have resulted in the complete abolishment of those limitations. Thus, in the *Denton* case, if the statute had been applied, an action based upon diversity of citizenship could have been brought in a district where neither plaintiff nor defendant resided and the defendant would have had no method of objecting to this violation of Judicial Code, section 51.

The differences between the Texas statute under consideration in the *Denton* and *Pinckney* cases and the Massachusetts statute now before the court are too obvious for mention. It has already been pointed out that enforcement of this statute involves no violation of the statutory or constitutional restrictions on Federal jurisdiction.

DAVIDSON MARBLE CO. *v.* GIBSON, 213 U.S. 10 (1909) (R. 107).

In this case a rule of the Circuit Court for the Northern District of California sought to perform substantially the function of the Texas statute in the *Denton* and *Pinckney* cases. It provided that where a special appearance was entered in support of a jurisdictional objection, the overruling of the jurisdictional objection would automatically turn the special appearance into a general appearance. The result plainly was to render all jurisdictional questions non-

appealable. Of course this Court decided that such a rule of court was invalid as being inconsistent with the Acts of Congress providing for appeal of jurisdictional questions to this Court.

The case is plainly of the same cloth with the *Denton* and *Pinckney* cases. It indicates that the courts will not permit the restrictions on Federal jurisdiction to be removed whether by state statute or by Federal court rule. It has already been pointed out that General Laws, chapter 227, sections 2 to 4, in no wise relaxes the limitations on Federal jurisdiction. *Davidson Marble Co.* v. *Gibson* plainly has nothing to do with the Conformity Act or the application of state practice to the Federal courts.

MECHANICAL APPLIANCE CO. *v.* CASTLEMAN, 215 U.S. 437 (1910) (R. 105-106).

This is another case of the *Denton* and *Pinckney* type. By the state practice the sheriff's return on process was conclusive. It was held that this practice could not be applied in the Federal courts since the conclusiveness of the sheriff's return might cause the Federal courts to exercise a jurisdiction beyond the statutory limits. Here again was the case of a state practice which *prevented the adjudication* of jurisdictional questions. It is totally unlike the Massachusetts statute now before the Court.

GOLDEY *v.* MORNING NEWS, 156 U.S. 518 (1884) (R. 104-105).

In this case it was necessary to decide whether the Federal courts sitting in New York could exercise jurisdiction over a foreign corporation not doing business in the state on the sole basis of service of process upon an agent casually within the state. At that time the New York courts claimed the right to exercise such jurisdiction. It had already been decided that judgments based upon the exercise of such

jurisdiction by the New York courts would not be given full faith and credit in other states.

*Lafayette Insurance Co.* v. *French*, 18 How. 404 (1855).

As soon as the question arose it was decided that the mere rendition of such judgments was an unconstitutional exercise of power by the State of New York.

*Riverside Mills* v. *Menefee*, 237 U.S. 189 (1914).

So of course this Court held that the Federal courts sitting in New York could not properly render judgment against a foreign corporation based upon such service of process.

The case holds no more than that a Federal court cannot apply a state practice which would result in a judgment not entitled to full faith and credit in any other court and itself violative of the due-process clause—in a word, that a Federal District Court cannot apply unconstitutional state statutes.

But something must be said as to the reasoning of the Circuit Court of Appeals based upon the *Goldey* case, and certain others. This Court said in the *Goldey* case that jurisdiction cannot be obtained over a non-resident "except by actual service of notice within the jurisdiction upon him or upon some one authorized to accept service in his behalf, or by his waiver, by general appearance or otherwise, of the want of due service." The majority opinion in the court below quotes this language (R. 104), and cites (R. 101) the familiar cases holding that a foreign corporation is not "present" within the jurisdiction, so that a personal judgment may be obtained against it, unless it does business within the state.

At this date the cases cited by Bingham, J., are scarcely news, but the conclusion drawn from them suggests novelty. In these cases this Court had to consider whether the fact

that a foreign corporation's agent was within a state placed the corporation in that state for purposes of suit. It has always been held that the presence of an agent within the jurisdiction does not afford a sufficient basis of power for a judgment against the foreign corporation; that a foreign corporation is only "present" where it does business. Of course in these cases the Court did not have before it the question whether there were *other* bases of jurisdiction over a foreign corporation—and particularly the question as to the existence and scope of jurisdiction over a foreign corporation resulting from its invocation of the jurisdiction of a sovereign. Yet from these decisions the Circuit Court of Appeals draws the conclusion that in no event can a judgment be rendered against a foreign corporation not doing business within the state unless it has appeared generally —and, more specifically, that General Laws, chapter 227, sections 2 to 4, are unconstitutional and inapplicable in the Federal courts.

One difficulty with this conclusion of Bingham, J., is that it proves too much. Consider that most ancient and conservative type of statute which permits set-off of liquidated claims with right of affirmative judgment against the plaintiff. If the Circuit Court of Appeals is right in its belief that doing business in the state is the only basis of jurisdiction over a foreign corporation, a State court could not render an affirmative judgment against a plaintiff foreign corporation under such a set-off statute. The opinion of Bingham, J., disregards the fact that the bringing of suit by a foreign corporation may properly and constitutionally afford the basis of jurisdiction for cross-claims against the plaintiff foreign corporation (see pp. 9-13 of this brief) and that this jurisdiction is entirely distinct from a jurisdiction predicated upon the corporation doing business within the state. A time-worn caution may here be usefully repeated:

"Every opinion must be read in the light of the facts there presented. Statements of rules as applicable to that case cannot be taken out of their context and stretched to different circumstances not before the mind of the court."

*Swan* v. *Justices of the Superior Court*, 222 Mass. 542, 545 (1916).

An interesting commentary on the analysis of decisions of this Court by the Circuit Court of Appeals is afforded by the statement that *York* v. *Texas* was overruled by *Riverside Mills* v. *Menefee* (R. 109). This statement is particularly challenging in view of the fact that in *Western Indemnity Co.* v. *Rupp*, 235 U.S. 261 (1914), the same judges that decided the *Menefee* case reaffirmed *York* v. *Texas* at the same term of court. If the Circuit Court of Appeals is right, this Court has overruled itself *sub silentio* at the same term, each decision being rendered by a unanimous court, and subsequent reaffirmance and explanation of *York* v. *Texas* in *Chicago Life Ins. Co.* v. *Cherry*, 244 U.S. 25 (1917), is meaningless. This is striking enough; but it is no less striking to find the Circuit Court of Appeals declaring (R. 109) that the decision in *Riverside Mills* v. *Menefee* also holds unconstitutional the Massachusetts statute now before the Court. The state practice involved in the *Menefee* case is wholly unrelated to the instant problem.

For a general criticism of the holding of the Circuit Court of Appeals in this case and further discussion as to the inadvisability of the result see *Federal Jurisdiction of Foreign Corporations as Limited by Doctrinal Immunity of Federal Jurisdiction to Modification by State Statute*, 40 Yale Law Journal, 441-448 (January, 1931).

## V.

### Conclusion.

We believe that the Conformity Act requires the application of this Massachusetts statute in the District Court for the District of Massachusetts, and that no decision of this Court or Act of Congress requires the contrary result. Still more surely are we convinced that the common sense of the situation requires the application of this statute. It is hardly believable that in the year 1931 in the national courts of this country it is necessary to litigate for nearly ten years, and to carry to the highest court in the land, the question whether one party to a transaction against whom suit is brought can prosecute a cross-claim arising out of the same transaction to an affirmative judgment. It is unthinkable that the ultimate decision of the Federal courts on this question should be in the negative. Elementary justice to the cross-claimant and ordinary efficiency of judicial administration demand that this type of proceeding receive the sanction of this Court.

## SECOND QUESTION: CONSTRUCTION OF THE MASSACHUSETTS STATUTE.

### STATEMENT OF THE CASE RELATING TO SECOND QUESTION.

Three actions arose out of the fish-oil contract in question.

The first action (District Court docket No. 2054) was commenced on September 15, 1922, in the Superior Court for Suffolk County, Massachusetts, by Frank L. Young Company, a Massachusetts corporation, by attachment of the oil drums of McNeal-Edwards Company, a Virginia corporation. The declaration alleged breach of warranty as to the oil. Counsel appeared specially on behalf of the McNeal-Edwards Company, removed the case to the United States District Court for the District of Massachusetts, and

there filed an answer (R. 73). Because of the limitation of recovery to the value of the attached property, a discontinuance was filed therein on February 28, 1927. The docket entries in this first case are set forth at R. 73.

The second action (District Court docket No. 2071) was commenced in the United States District Court by McNeal-Edwards Company, alleging failure to return the drums within a reasonable time. Personal jurisdiction over Frank L. Young Company was, of course, obtained. Asa P. French was attorney of record for the plaintiff. This action was tried with the case at bar, and resulted in a judgment for the respondent for one hundred dollars' damage. Docket entries in this suit are set forth at R. 74 to 75.

While the second action was pending, Frank L. Young Company commenced the present action (District Court docket No. 3021) and caused service to be made on the respondent by serving Asa P. French "as said French is attorney of record" of the respondent (R. 4) in compliance with the provisions of the statutes above set forth (*supra*, pp. 3-4). The writ in this third action was dated January 4, 1927, and was duly entered March 22, 1927. Docket entries in this suit are set forth at R. 75 to 77.

The plea in abatement and motion to dismiss of McNeal-Edwards Company in the present action were overruled and denied (R. 6, 9, 82).

## SUMMARY OF ARGUMENT ON SECOND QUESTION.

For convenience the essential language of the statute is again quoted (full text at pp. 3-4, *supra*):

> "SECTION 2: If an action is brought by a person not an inhabitant of the commonwealth . . . he shall be held to answer to any action brought against him here by the defendant in the former action, if the demands are of such a nature that the judgment or execution in

the one case may be set off against the judgment or execution in the other . . .

"Section 3: The writ in such cross-action may be served on the attorney of record for the plaintiff in the original action."

The contention of counsel for McNeal-Edwards Company may be briefly stated. There is no contention that the present case does not come within the language of section 2, taken of itself. It is urged, however, that section 3 limits the scope of section 2; by referring to the non-resident's action as the "original action," it requires that this be the first action between these parties; by referring to the defendant's action as a "cross-action," it requires that this be the second action between these parties. Applied to the present case, the argument is that since Frank L. Young Company itself brought, and then discontinued, the first action in this series of lawsuits, the action of McNeal-Edwards Company is not an "original action," the present action is not a "cross-action," and therefore the statute does not apply. We proceed to consider this contention.

These sections are remedial legislation and are therefore entitled to a broad and liberal construction with a view to fulfilling their obvious purpose. This principle is peculiarly applicable to a law relating to set-off and counterclaim, which is "something more than a procedural convenience and is really a requirement of substantial justice."

The obvious purpose of this statute is to prevent the essential injustice inherent in a non-resident coming within the jurisdiction, invoking the power of its courts and yet withholding itself beyond the power of the court with reference to claims against it held by the person sued. Precisely this injustice will occur here unless the statute is held applicable. McNeal-Edwards Company has brought a suit in the District Court for the District of Massachusetts, has obtained personal jurisdiction over Frank L. Young Com-

pany, and has been awarded judgment for $100. The jury's verdict indicates that it nevertheless owed in the same transaction $10,700. If the statute is not applied to this case, McNeal-Edwards Company, the substantial debtor to the extent of $10,600, will, as the ultimate result of the litigation, receive payment of $100 plus the costs of two suits. No clearer violation of the policy behind General Laws, chapter 227, sections 2 to 4, could be imagined.

This case is within the letter of the Massachusetts statute no less plainly than its spirit. There is no contention that this action does not fall within the language of section 2, taken alone. Does section 3 limit section 2? We submit that it does not. The word "cross-action" in section 3 is only a word of reference to the action brought *against* the nonresident defined in section 2. The word "original action" is only a word of reference to the action brought *by* the nonresident defined in section 2. These words of reference should be given no more significance than if the words "latter action" and "former action" had been used. No limiting intent is apparent on the face of section 3. Moreover the words "original action" and "cross-action" are words of relationship; in a series of lawsuits the fifth is as much a "cross-action" to the fourth as is the second to the first. The limiting construction contended for by the respondent imputes to the Massachusetts legislature an intent to remedy less than the whole injustice at which the statute was aimed.

## ARGUMENT ON SECOND QUESTION.

### I.

### This Statute, being Remedial, must be Liberally Construed to Accomplish its Obvious Purpose.

This Court and others have given consistent recognition to the canon of statutory construction that remedial statutes are to be liberally construed and that the strict letter

of the act must yield, if necessary, to its evident spirit and purpose.

*Fleischman Co.* v. *United States,* 270 U.S. 349, 360 (1926).
*Holy Trinity Church* v. *United States,* 143 U.S. 457, 463 (1892).
*Camunas* v. *New York &c. Co.,* 260 Fed. 40, 52 (1919, 1st C.C.A.).
*Interstate Drainage &c. Co.* v. *Board of Commissioners,* 158 Fed. 270, 273 (1907, 8th C. C.A.).

The Court will "look to the reason of the enactment and inquire into its antecedent history and give it effect in accordance with its design and purpose, sacrificing, if necessary, the literal meaning that the purpose may not fail."

*Ozawa* v. *United States,* 260 U.S. 178, 194 (1922).

Particularly has this principle been applied to statutes such as that before the Court, which provide for set-off and counterclaim.

*Champlin Refining Co.* v. *Gasoline Products Co.,* 29 F. (2d) 331, 338 (1928).
*Perry* v. *Pye,* 215 Mass. 403, 414 (1913).
*Galligan* v. *Fannan,* 9 Allen, 192 (1864).
*Sargent* v. *Southgate,* 5 Pick. 312, 316 (1827).
*Stewart* v. *Knight,* 83 Vt. 201, 203 (1910).
*Seibert* v. *Dunn,* 210 N.Y. 237, 245 (1915).
*Imbriglio* v. *Gazzero,* 43 R.I. 83 (1920).

A reference to the history of the Massachusetts statute, the language of which has undergone little change since its original enactment in 1823, shows that it was regarded as a part of the law of set-off by the Commissioners on the

Revision of Statutes in 1834 and retained by them as such. Its place in the modern Massachusetts law of set-off has already been indicated at pages 17 to 21 of this brief. Its validity as part of the law of set-off was upheld by the Supreme Judicial Court of Massachusetts in *Aldrich* v. *E. W. Blatchford & Co.*, 175 Mass. 369 (1900), *supra*, and it is as such that the statute was held applicable to the Federal courts in *Arkwright Mills* v. *Aultman & Taylor Co.*, 128 Fed. 196; S.C., appealed on merits, 145 Fed. 783 (1906).

The purpose this statute serves and the abuse it seeks to correct are apparent. The legislature has considered it fundamentally unjust that a non-resident should be able to bring suit, obtain personal jurisdiction over and an enforceable judgment against a resident, and yet withhold himself beyond the reach of process in other actions. Particularly is this injustice apparent where, as here, the other action arises out of the same contract. The non-resident is under no compulsion to bring suit and invoke the jurisdiction of the local courts; but through this statute the legislature declares that, if he does so, he must submit to a general accounting between himself and the resident, and permit the court to render an enforceable judgment for the substantial creditor between them.

## II.

### The Present Case is within the Letter and Spirit of the Statute.

In this case McNeal-Edwards Company, a non-resident, was sued by the Young Company in an action in which jurisdiction was limited to the value of attached drums. McNeal-Edwards Company could, had it so chosen, have defended its interest in the drums without submitting personally to the jurisdiction of the District Court. *Cheshire National Bank* v. *Jaynes*, 224 Mass. 14 (1916). But it was not content to defend; it wished to attack. It therefore brought an action in the District Court against the Young Company

for damages for the latter's failure to return the drums. It thus obtained personal jurisdiction which could form the basis of a personal judgment. *And such judgment has actually been obtained.* McNeal-Edwards Company now insists that it is nevertheless not amenable personally to the jurisdiction of the court in which it brought its own action. It seeks to hold Frank L. Young Company personally, and yet to withhold itself personally from the court's jurisdiction. If there are considerations of elemental fairness behind the statute, there can be no question that McNeal-Edwards Company seeks to violate them. No set of facts could bring a case more clearly within the spirit of the statute.

The case is not less within the letter of the statute. The act requires (*a*) that an action be brought by a person not an inhabitant of the Commonwealth—McNeal-Edwards Company is such a person; (*b*) that the person cannot be found within the jurisdiction to be served with process—McNeal-Edwards Company could not be so found; (*c*) that the demands be of such a nature that executions may be set off against each other—they are of such a nature; (*d*) that service be made upon the attorney of record—it was so made.

In the courts below it was repeatedly argued that the statute applies only to "cross-actions" against non-residents, that the suit brought by McNeal-Edwards Company was itself a "cross-action," and therefore could not be an "original action" within the language of the statute, to which a "cross-action" could be brought.* Unembarrassed by detailed reference to the statute, this suggestion has some appearance of plausibility. For present purposes the essential words of the statute are the following:

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*Of course the fact that the writ in the present action of Frank L. Young Company was dated before the former action was discontinued is immaterial, since the discontinuance was filed before this action was entered or any plea in abatement filed. *Manufacturers Bottle Co.* v. *Taylor-Stites Glass Co.*, 208 Mass. 593 (1911); *Spear* v. *Coggan*, 223 Mass. 156, 157 (1916).

"If an *action* is brought by a person not an inhabitant . . . he shall be held to answer to *any action* brought against him here by the defendant in the *former action*. . . . If there are several defendants *in the original action*, each of them may bring such *cross-action*. . . . The writ in *such cross-action* may be served on the attorney of record."

It seems clear that the first sentence of the statute establishes the substantive rights of litigants. There is no question that McNeal-Edwards Company brought "an action" and that the present suit is "any action" brought by the "defendant in the former action." It has never been doubted that, if the first sentence of the statute stood alone, McNeal-Edwards Company would be within its provisions. However, it is contended that the meaning of this sentence is narrowed by the second and third sentences, the argument being that, by referring to "an action brought by a person not an inhabitant" as "the original action" and by referring to the action brought in pursuance of these sections as a "cross-action," the legislature established statuses of "original actions" and "cross-actions"; that McNeal-Edwards Company was plaintiff only in a "cross-action"; and therefore that the statute could never apply to it.

Several remarks may be made about such an argument.

(*a*) Clearly the words "original action" and "cross-action" are used merely as shorthand expressions to refer back to the suits already described in the broadest possible terms in the first sentence of the statute. There is no indication that the legislature intended by these reference words to limit the generality of the foregoing operative language.

(*b*) Even if the words "original action" and "cross-action" had been used in a limiting sense or had appeared in the first sentence, they would not restrict the rights of the Frank L. Young Company. These are terms which express

not an absolute status, but a relation to some other action. Thus it is quite proper to state that the suit of *McNeal-Edwards Company* v. *Frank L. Young Company* was a "cross-action" as to the first suit of *Frank L. Young Company* v. *McNeal-Edwards Company*. But it is equally true that the second suit of *Frank L. Young Company* v. *McNeal-Edwards Company* is a "cross-action" as to the suit of *McNeal-Edwards Company* v. *Frank L. Young Company*. Suppose, for example, that the present contract had called for deliveries by instalments, that the Young Company had sued McNeal-Edwards Company for breach of warranty in the first instalment and that McNeal-Edwards Company had then sued the Young Company for the price of the second instalment; would it be contended that, if the Young Company brought suit for breach of warranty in the second instalment, that was not a cross-action as regards the McNeal-Edwards Company suit? The terms used in the statute express relationship to prior litigation. In a series of suits the fifth is as much a cross-action to the fourth as the second is to the first. The temper of the Massachusetts courts toward such a question is indicated by the closely analogous holding that where A has sued B, and B has filed a declaration in set-off, A may file a declaration in set-off to B's set-off.

*Galligan* v. *Fannan*, 9 Allen, 192 (1864).

(*c*) Finally, such an argument as is made for McNeal-Edwards Company assumes that the legislature intended to correct less than the whole abuse at which its enactment aimed. The Young Company is a resident against whom a non-resident has obtained personal judgment by a suit in this jurisdiction. Unless service can be made and jurisdiction obtained under these statutes, the Young Company will be unable to try out both sides of the dispute on this contract. This is precisely the situation the statute was in-

tended to remedy. Certainly an intention of the legislature to accomplish less than its whole purpose will not be imputed without clear words.

It may not be inappropriate at this point to quote from the opinion of Circuit Judge Mack in *The Gloria*, 286 Fed. 188, 192 (1923), *supra*, cited by the court below with approval in *Champlin Refining Co.* v. *Gasoline Products Co.*, *supra*. The United States moved to dismiss certain cross-libels filed against it, claiming the immunity of a sovereign from suits in its own courts. Denying the motions, the judge said:

> "Recognition is just beginning to be given to the fact that the right (*i.e.*, of counterclaim) as between litigants is something more than a procedural convenience and is really a requirement of substantial justice. . . . *A modern court should strive to do complete justice; a partial and incomplete adjudication tends only to protract and complicate litigation to the detriment of all concerned.*"

## THIRD QUESTION: PETITIONER'S RIGHT TO RECOVER AS A MATTER OF CONTRACT LAW.

### STATEMENT OF THE CASE RELATING TO THIRD QUESTION.

In January, 1922, Frank L. Young Company contracted to buy from McNeal-Edwards Company 1000 to 1200 barrels of "Prime A Crude Menhaden Fish Oil," at 33 cents per gallon, in seller's drums, delivered in Baltimore, "Drums to be returned to sellers, freight prepaid." This contract was contained in a purchase order and broker's note (R. 18-19). Reilly-Edwards Company were the brokers, to whom, by custom of the trade, orders were addressed and by whom orders were accepted on behalf of the seller (R. 28).

The lot of oil comprised 1107 barrels (R. 24). It was shipped from Baltimore, arrived at the Young Company's plant in Boston in January or February (R. 28), and was duly paid for (R. 29). Prime A Crude Menhaden Fish Oil at 60 degrees, Fahrenheit, contains 8 to 15 per cent of "foots," that is, of whitish solids (R. 20). The oil shipped by McNeal-Edwards Company contained 80 per cent of foots (R. 22-23). This high percentage of solids rendered it impossible to dump the oil from the drums in cold weather, and very difficult even in July and August. It was finally dumped in July and August (R. 22, 80-81). Due to the high percentage of solids, the oil delivered was not Prime A oil (R. 28, 35), and its value was only 17 cents per gallon (R. 36) as against a contract price of 33 cents.

Frank L. Young Company complained as to the quality of the oil at once (R. 29), and the controversy with reference thereto lasted several months (R. 30). McNeal-Edwards Company demanded return of the drums. It was pointed out by the Young Company that the drums could not be returned until empty and that excessive viscosity prevented pouring until mid-summer; moreover, that the Young Company desired McNeal-Edwards Company to inspect this oil in the original containers (R. 80-81). Obtaining no satisfaction from McNeal-Edwards Company regarding the quality of the oil, Frank L. Young Company brought suit and attached the drums on September 15, 1922 (R. 69).

For a more complete statement the charge of Judge Morton in the District Court cannot be improved upon (R. 59-70).

The jury found the oil defective, and awarded damages of $10,730.17 to Frank L. Young Company (R. 71). In the companion case, brought by McNeal-Edwards Company, the jury found that Frank L. Young Company had retained the drums beyond a reasonable time, and awarded $100 damages to McNeal-Edwards Company (R. 71).

## SUMMARY OF ARGUMENT ON THIRD QUESTION.

Respondent's contention is that Frank L. Young Company is incapacitated from recovering its damages of $10,730.17, suffered by reason of defective quality of the oil, because it caused $100 damage to respondent by retaining an unreasonably long time the drums in which the oil had been shipped. This contention was upheld by the original opinion of the Circuit Court of Appeals (R. 86), now superseded (R. 92).

At the outset there should be noted certain qualities of the breach of contract by Frank L. Young Company which is alleged to disqualify it from recovering. *The breach concerns a collateral and ancillary provision of the contract* not going to the heart of the consideration. This was a contract for the purchase and sale of fish oil, not a transaction in second-hand containers. The essential obligation of McNeal-Edwards Company was to deliver oil of a specified quality; the essential obligation of Frank L. Young Company to pay unwards of $18,000. This obligation the Young Company performed. Its breach concerns only the separable and wholly incidental obligation to return the used containers. *The Young Company's breach occurred subsequent to the breach of McNeal-Edwards Company,* and from the nature of the contract a breach by the buyer in failing to return the drums on time must have occurred subsequent to a breach by the seller through delivering defective oil. *The Young Company's breach was trifling* with relation both to the size of the transaction and to the extent of the breach of McNeal-Edwards Company.

For two procedural reasons no defense based upon petitioner's breach is raised on the record:

(A) No defense based upon the Young Company's breach was raised by the pleading. Upon delivery of defective oil the Young Company had a matured cause of action, upon which it could immediately have brought suit. Any subse-

quent matter, including a subsequent breach of contract, alleged to destroy this cause of action, had to be pleaded as an affirmative defense. The elaborate answer filed by McNeal-Edwards Company contained no defense based upon breach of contract by Frank L. Young Company.

(B) Assuming such a defense to be in issue under proper pleadings, it was not properly raised at the trial. The errors of the District Court assigned by respondent (Nos. 4, 7, and 8, R. 83-84) consist in the denial of requests for instructions to the jury that the Young Company could not recover because of its failure to return the drums. Under Rule 44 of the Massachusetts Superior Court, adopted for the District Court for the District of Massachusetts by its Rule 35, this question could be raised only by motion for directed verdict, and not by requests for instructions. A motion for directed verdict was filed, but was never presented to the court; no ruling was made or requested thereon and no exception taken to any ruling or failure to rule. Under unequivocal decisions of the Massachusetts courts construing Rule 44 the district judge was compelled to deny the requests for instructions upon which alone the respondent relies and can rely.

Assuming the issue to have been properly pleaded, and further assuming that the question could have been raised by requests for instructions, the requests were properly denied as a matter of the law of contracts.

Under *Swift* v. *Tyson* the District Court was bound to apply the general commercial law to the question whether the Young Company's breach rendered it incapable of recovering damages for McNeal-Edwards Company's breach. Under the general commercial law, well established since the leading English case of *Boone* v. *Eyre* and adopted by this Court and the Circuit Courts of Appeals generally, a breach by the plaintiff is available in defense only if it is substantial, goes to the heart of the consideration, and is prior

to or contemporaneous with the defendant's breach. None of these qualities exist in the case at bar. Here the breach is trifling, relates to a collateral and ancillary provision of the contract, and is subsequent by many months to the defendant's breach. It could be and has been amply compensated for in damages.

It is argued that the Young Company's breach was "wilful" and that all wilful breaches—whether or not substantial, whether or not going to the essence of the consideration, and whether prior or subsequent in time—incapacitate a party from recovering. This argument must be subdivided into the contention made *ex proprio motu* by the Circuit Court of Appeals, and the contention advanced by counsel for McNeal-Edwards Company (which has thus far received approval from no judge connected with this case).

The Circuit Court of Appeals in its first opinion ruled that the retention of the drums to September 15 was an intentional breach and precluded Frank L. Young Company from recovery. This thought, as already suggested, was original with the Court. In the first place the record discloses no evidence upon which the jury could find, much less be compelled to find, that the breach was intentional. It was primarily upon this ground that the successful petition for rehearing in the Circuit Court of Appeals was based. Detailed analysis of the record on this point, otherwise unjustified, is included hereafter. In the second place there is no doctrine that an intentional breach by the plaintiff is a bar to recovery where the breach is not substantial and does not go to the heart of the consideration. The intentional nature of the breach may affect its substantiality; thus, in a contract for personal services, where there is an obligation of fidelity, falsification of accounts may constitute a substantial breach where honest error would be unsubstantial. Such a case was *Sipley* v. *Stickney*, 190 Mass. 43, upon which the Circuit Court of Appeals relied. But in the ordinary commercial transaction, not involving fiduciary or

quasi-fiduciary relationships between the parties, the fact that the breach is wilful rather than negligent is immaterial.

Respondent's counsel contended in the Circuit Court of Appeals, and presumably contends here, that the attachment by Frank L. Young Company, on September 15, 1922, of the drums which it was obligated to return was a wilful breach incapacitating it from recovery. There are three answers to this contention: *First*, the attachment of the drums was no breach at all. All creditors of McNeal-Edwards Company had the statutory right to attach its property within the state. The Young Company in this respect had the rights of any other creditor. *Second*, the fact that the attachment of September 15 was no breach is now *res judicata*. In the companion case of *McNeal-Edwards Company* v. *Frank L. Young Company* the district judge ruled that the attachment on September 15 was no breach, and that McNeal-Edwards Company could recover only for such detention up to September 15 as was unreasonable. This case has now gone to judgment and the determinations therein can no longer be disputed. *Third*, the wilfulness of a breach is immaterial provided the breach is unsubstantial and does not go to the heart of the consideration. This point has been enlarged above with reference to *Sipley* v. *Stickney*.

Finally a decision that, where A and B have contracted, a breach by A to the extent of $100 prevents him from recovering for a breach by B to the extent of $10,700 is revolting to the common sense of lawyers and laymen alike.

## ARGUMENT ON THIRD QUESTION.

The original opinion of the Circuit Court of Appeals (R. 86) reversed the judgment of the District Court on the merits and ordered judgment for the defendant on the ground that Frank L. Young Company had broken its contract to the extent of $100 through unreasonable detention

of the drums and was thereby incapacitated from recovering for the breach by McNeal-Edwards Company amounting to $10,730.17. After this opinion was announced a petition for rehearing was granted (R. 92) and a different judgment given (R. 92) upon new grounds stated in the second opinion (R. 92). It seems an open question whether the Circuit Court of Appeals still entertains the views expressed in its original opinion. In any event, counsel for McNeal-Edwards Company still urge their contention on the merits. We therefore brief this question fully.

## I.

### No Defense Based upon Petitioner's Breach of Contract is Raised upon the Record.

It is later argued that the alleged defense based upon petitioner's breach in retaining the drums beyond a reasonable time is insufficient in law. For the moment we point out that *twice* respondent failed to take the necessary procedural steps to raise the question on the record at all. In the first place it failed to allege petitioner's breach in its answer although such breach was plainly matter of affirmative defense. In the second place it sought to save its rights of appellate review by requests for rulings, rather than motion for directed verdict, as required by the District Court rules.

It is frankly conceded that the second of these procedural objections is largely technical. But the first is not. An elaborate answer by the defendant in the District Court put the plaintiff upon notice of several defenses, but made no mention of alleged breach by the plaintiff. Examination of the testimony will indicate that no emphasis was placed upon such breach at the trial. (The companion case with its trifling consequences was allowed to go substantially by default.) Pleadings have a real function—to inform the parties of the issues to be tried. If these pleadings are held

to raise a defense of the plaintiff's breach, the plaintiff has been substantially prejudiced.

A. Petitioner's Detention of the Drums was Matter of Affirmative Defense Required to be Pleaded in Respondent's Answer. It was Not so Pleaded.

The petitioner's declaration sets forth breaches of warranty in connection with a consummated sale. The attention of the court is respectfully directed to the respondent's answer (R. 12). It consists of four paragraphs, the first of which is a general denial; the second a specific denial that the oil was not as ordered; the third and fourth set up defenses relating to the analysis of the oil and adjustments made on account of excess acids. *There is no suggestion that Frank L. Young Company has committed any breach of contract on its part, or that there has been any failure of consideration for defendant's promise.*

By the Massachusetts Practice Act (General Laws, chapter 231, section 28) a defendant's answer is required to "state clearly and precisely each substantive fact intended to be relied upon in avoidance of the action," and defenses not pleaded are not considered by the courts. This rule has been applied so often in the State courts that a few representative cases only need be cited:

*Mark* v. *Stuart-Howland Co.*, 226 Mass. 35 (1917) (abandonment of contract).

*Grinnell* v. *Spink*, 128 Mass. 25 (1879) (accord and satisfaction).

*Nowell* v. *Equitable Trust Co.*, 249 Mass. 585, 595 (1924) (*ultra vires* contract).

*Aisenberg* v. *Royal Insurance Co., Ltd.*, 266 Mass. 543 (1929) (statute of limitations).

*Indiana Flooring Co.* v. *Rudnick*, 236 Mass. 90, 92 (1921) (partial failure of consideration).

Under the Conformity Act this rule was made binding on the District Court, and it has been recognized and held applicable in the Circuit Court of Appeals.

*Hallett* v. *New England Roller Grate Co.*, 119 Fed. 873 (1903, 1st C.C.A.).

The result is that on these pleadings only those issues were raised which the plaintiff must aver and prove in order to establish a prima-facie case. *Friedenwald & Co.* v. *Warren*, 195 Mass. 432, 434 (1907). This burden is sustained by proving to the satisfaction of the jury that the oil delivered was not of the quality and grade called for by the contract (R. 14).

It was no part of petitioner's case in the District Court to allege and prove performance of the obligation to return the drums within the reasonable time. Where part of the performance of one party to a contract is necessarily later in time than the principal performanee thereunder, such performance cannot be regarded as a condition precedent of the other party's obligation unless an express intention to this effect appears.

It is settled that—

> "A plaintiff whose performance is due subsequently to that of the defendant need not allege or prove either performance or tender on his part. . . . The burden is thrown upon the defendant to allege the failure of consideration which will excuse him from liability."

2 Williston, Contracts, sec. 884.

Therefore, when the buyer paid the full contract price and received oil of grossly inferior quality, the seller's obligation to respond in damages for breach of the warranties of the contract became complete. The petitioner could have commenced an action immediately, and certainly long before the time when it was obliged to return the drums.

It follows that there was no error in the conduct of the trial of which respondent could complain. Since no such issue was raised by the pleadings, the judge could not properly have instructed the jury concerning the effect of the alleged subsequent breach on petitioner's right to recover for breach of warranty. "It is reversible error for the judge in his charge, for the first time so far as appears, to suggest a ground of exoneration for breach of contract, which was not open under the pleadings."

*Mark* v. *Stuart-Howland Co.*, 226 Mass. 35, 42 (1917).

B. Under the Rules of the District Court a Defense Based upon Frank L. Young Company's Breach could be Raised at the Trial only by Motion for Directed Verdict. It was Not so Raised.

Assuming that a defense based upon Frank L. Young Company's breach of contract was put in issue by the pleadings, appropriate steps under the District Court rules were not taken to raise the question at the trial or to preserve respondent's rights on appeal.

A motion for directed verdict was filed (R. 13), but was not presented to the court and was not ruled upon. No objection or exception was taken to any ruling or failure to rule with relation to the motion for directed verdict.

Respondent sought to raise this question before the district judge by the following requests for instructions (R. 58-59):

"1. Upon all the evidence your verdict must be for defendant, McNeal-Edwards Company.

"6. That where a person owes a duty to do an act by virtue of the obligation placed upon him by a valid contract, he has no right to knowingly do another act which will make it impossible for him to fulfill that obligation. To apply this to the case at bar, Frank L.

Young Company, owing a duty to return the drums promptly, had no right by their intentional act to cause the drums to be placed in custodia legis, that is, under attachment, and to claim that they were therefore unable to so return them to McNeal-Edwards Company.

"7. To so place them under attachment as described in the foregoing request, and to still retain them, constitutes a breach of the contract in suit, and your verdict must be for the defendant."

It will be observed that by these requests the court was asked to direct a verdict for the defendant. Request No. 1 is in terms a request for a directed verdict. Requests Nos. 6 and 7 are in effect one request—the premise and conclusion of the proposition of law advanced by counsel for McNeal-Edwards Company. These, too, ask expressly for a directed verdict.

Under the rules of practice prevailing in the District Court for the District of Massachusetts any attempt to raise the question of the insufficiency of the plaintiff's case by means of requests for rulings is improper and such requests must be denied.

"To pass upon such a request other than to deny it would violate Common Law Rule 44 of the Superior Court." *Patton* v. *DeViney*, 259 Mass. 100, 102 (1927). To similar effect are *Carp* v. *Kaplan*, 251 Mass. 225 (1925), and, more recently, *Palefsky* v. *Connor*, Adv. Shs. 531, 534 (1930).

The rule referred to reads, in part, as follows:

"The question whether the court should order a verdict must be raised by a motion. Such question shall not be raised by a request for instructions to the jury."

This, together with the other rules of the Superior Court, has been adopted by the United States District Court for the District of Massachusets by Rule 35 of said court:

*"Cases Not Otherwise Provided For*

"In all cases not provided for by the rules of this court, causes at law shall proceed as nearly as may be advisable in accordance with the law for the time being of the Commonwealth of Massachusetts and the rules of the Superior Court of said Commonwealth."

The application of the Superior Court Rule 44, it should be noted, is not due to the Conformity Act, but to its express adoption by Rule 35 into the practice of the District Court

Apart, therefore, from their inapplicability to the issues raised at the trial, and because they violated the rules of court, the respondent's requests were necessarily refused.

## II.

**Upon the Principles of General Commercial Law Applicable to this Transaction, a Defense Based on the Unreasonable Detention of the Drums, even if it had been Duly Raised, would be Insufficient to Bar the Petitioner's Action.**

The Circuit Court of Appeals purported to be applying Massachusetts law to this transaction, and in so doing assumed a state of facts which, it will be shown later (pp. 66-70), did not exist. Petitioner contends that the decision should have been governed by the recognized principles of general commercial law, by which a breach not going to the essence of the contract is not a bar to recovery on the contract, but only matter in mitigation of damages. Petitioner further contends that, even if the court could properly follow Massachusetts law, it erred in holding that the particular doctrine typified by *Sipley* v. *Stickney*, 190 Mass. 43, was applicable regardless of the unsubstantial nature of the breach, the independence of the promise broken, and the lack of bad faith on the part of the petitioner.

A. THIS IS THE TYPE OF CASE IN WHICH THE FEDERAL COURTS ARE BOUND TO FOLLOW THE GENERAL COMMERCIAL LAW.

The rule is sustained by many decisions of this court that, in determining questions of general or commercial law, the Federal courts are bound to exercise their independent judgment, and that they will not follow state decisions when such decisions are contrary to the general weight of authority.

*Swift* v. *Tyson*, 16 Peters, 1, 19 (1842).
*B. & W. Taxicab Co.* v. *B. & Y. Taxicab Co.*, 276 U.S. 518, 530 (1928).

Matters involving the consideration for a contract (*Swift* v. *Tyson, supra*); its validity (*B. & W. Taxicab Co.* v. *B. & Y. Taxicab Co., supra; Liverpool Steam Co.* v. *Phenix Insurance Co.*, 129 U.S. 397, 443 (1889); the effect of irregularities in its authorization (*Pana* v. *Bowler*, 107 U.S. 529, 540 (1882); the rights of successive assignees (*Salem Co.* v. *Manufacturers' Co.*, 264 U.S. 182, 191 (1924); the right of action for a so-called "anticipatory" breach (*H. T. Smith Co.* v. *Minetto-Meriden Co.*, 168 Fed. 777 (1909), the validity of arbitration provisions (*Jefferson Fire Ins. Co.* v. *Bierce*, 183 Fed. 588 (1910), all these and many similar questions have been held to be matters on which the Federal courts would reach conclusions independent of state decisions. Whatever doubt may be entertained with respect to the rule of *Swift* v. *Tyson* as an original proposition, the authority of that case is not questioned within its proper scope, and the present case falls clearly within the rule and requires no extension.

In addition to the general commercial nature of the question of law presented, it seems proper to point out that the facts involved in the transaction peculiarly require the application of general commercial law. The transaction was largely consummated outside of Massachusetts, though not confined to any one state. Thus, the contract was made in

Maryland and the oil was to be delivered f.o.b. Baltimore; payment was to be made by "cash against documents," presumably on delivery of the documents in Baltimore; the "drums to be returned to sellers, freight prepaid," a performance not completed until the drums reached Virginia. Entirely apart from questions which might otherwise arise concerning the proper law of contract (American Law Institute: Conflict of Laws, Restatement, secs. 384, 385) the transaction was a general commercial transaction, over which the laws of different states had at least some control, rendering this case peculiarly apt for the application of the general commercial law.

B. It is the General Commercial Law that Only a Substantial Breach by the Plaintiff of a Promise Going to the Essence of the Contract can Bar Recovery. Any Other Breach is Cause Only for Recoupment or a Separate Action.

It is submitted that it is not, and never was for any length of time, a part of the law of commercial dealings that a slight deviation of one party from the terms of the contract bars him from recovering against the other party for nonperformance. The doctrine that the plaintiff must always show his own *complete* performance of the contract as a condition of recovery never gained a foothold in the law. Applied first by Lord Mansfield, it was discarded by that same eminent judge four years later in *Boone* v. *Eyre*, 1 H. Bl. 273 (1777).

*Boone* v. *Eyre* needs no discussion in this Court. Through the medium of Serjeant Williams' third rule, based on this case, it has become deeply rooted in English and American decisions alike that "*where the Plaintiff has broken the contract in some particular, and the breach of contract on the Plaintiff's side goes only to part of the consideration, and may be paid for in damages, it is matter for a cross action*

*or an allowance, and does not bar the Plaintiff altogether"* [per Lord Blackburn, (7 H.L. at 814)].

The rule is restated by Lord Ellenborough in *Davidson* v. *Gwynne*, 12 East, 381, 389 (1810):

> "It is useless to go over the same subject again, which has been so often discussed of late. . . . The principle laid down in *Boone* v. *Eyre* has been recognized in all the subsequent cases, that *unless the non-performance alleged in breach of the contract goes to the whole root and consideration of it, the covenant broken is not to be considered as a condition precedent but as a distinct covenant, for the breach of which the party injured may be compensated in damages.*"

More recent English cases following *Boone* v. *Eyre* are—

*Newson* v. *Smithies*, 3 H. & N. 840 (1858).
*Inman Steamship Co.* v. *Bischoff*, 7 App. Cases, 670 (H.L. 1882).
*General Billposting Co., Ltd.*, v. *Atkinson*, [1909] A.C. 118, 121.

This Court recognized the same rule in the case of *Goldsborough* v. *Orr*, 8 Wheat. 217, 224 (1823), and again in *Emigrant Co.* v. *County of Adams*, 100 U.S. 61 (1879), saying, in the latter case:

> "But here the contract was largely carried into execution soon after its inception. The engagements of the appellants to introduce settlers and the like were to be performed in the future; and their performance was not made a condition, but, as before stated, rested in covenant. In case of a breach they would lay the foundation of an action but nothing more."

Among the Circuit Courts of Appeals the leading case is *Kauffman* v. *Raeder*, 108 Fed. 171 (1901, 8th C.C.A.), but the following language from *Barnett Foundry Company* v.

*Crowe*, 219 Fed. 450 (1915, 3d C.C.A.) restates the doctrine of *Boone* v. *Eyre* perhaps more succinctly:

> "These questions are controlled by the principle of law that a breach of a covenant, which goes to the whole consideration of a contract gives to the injured party the right to rescind the contract or to recover damages for the breach; or stated conversely, a breach of the *covenant which does not go to the whole consideration of the contract, but which is subordinate and incidental to its main purpose, does not constitute a breach of the entire contract or warrant its rescission by the injured party.* . . . While every breach of a contractual relation confers a right of action upon the injured party, it is thus seen that *every breach does not operate as a discharge.*"

For cases in other circuits see —

*Ainesworth Coal & Iron Co.* v. *Grangesberg Oxelosund*, 287 Fed. 291, 295 (1923; 4th C.C.A., quoting *Boone* v. *Eyre*).

*McDonough* v. *Evans Marble Co.*, 112 Fed. 634 (1902, 6th C.C.A.).

*Central Appalachian Co.* v. *Buchanan*, 73 Fed. 1006 (1896, 6th C.C.A. per Taft, J.).

*Busch* v. *Stromberg-Carlson Co.*, 217 Fed. 328, 333 (1914, 8th C.C.A.).

*Hartman* v. *Ruby*, 16 App. D.C. 45, 57.

*Neenan* v. *Otis Elevator Co.*, 180 Fed. 997, 1000 (1910, S.D. N.Y. per Hand, J.).

Cases following *Boone* v. *Eyre* in the State courts are legion, but the following have been selected as presenting decisions on facts closely analogous to those now before the Court:

*Kinney* v. *Federal Laundry Co.*, 75 N.J. L. 497 (1907).

*Rioux* v. *Ryegate Brick Co.*, 72 Vt. 148, 155 (1900).

*Turner* v. *Mellier*, 59 Mo. 526, 536 (1875).

*Liggett* v. *Smith*, 3 Watts (Pa.), 331 (1834).

*Morrison* v. *Galloway*, 2 Harris & J. (Md.) 461, 467 (1809).

*Danville Bridge Co.* v. *Pomeroy*, 15 Pa. State, 151 (1850).

*Farmers &c. Bank* v. *First &c. Bank*, 152 S.E. 403 (N.C. 1930).

Because of the emphasis placed by the court below on Massachusetts law, it seems appropriate to close this wealth of citations with language from Chief Justice Shaw (*Mill Dam Foundery* v. *Hovey*, 21 Pick. 417, at 439 (1839)), indicating how fully the doctrine of *Boone* v. *Eyre* has been adopted by the Massachusetts courts:

> "3. The non-performance on one side must go to the entire substance of the contract, and to the whole consideration, so that it may be safely inferred as the intent and just construction of the contract, that if the act to be performed on the one side is not done, there is no consideration for the stipulations on the other side. And therefore though there be a breach of an express or implied covenant on one side, attended with some loss and damage to the other, yet if it does not go to the whole consideration, and the loss can be compensated in damages, the stipulation must be construed to be independent, for breach of which the party sustaining such loss has his remedy by action, but it is not a condition precedent, upon the non-performance of which the other party is absolved from the performance of the stipulations on his part."

C. The General Commercial Law Principle of Boone v. Eyre is Equally Applicable Though the Plaintiff has Voluntarily Defaulted in the Performance of a Collateral Provision of the Contract.

The Circuit Court of Appeals in its first opinion announced a doctrine that an intentional breach by one party of a provision of a contract, however insignificant, constitutes a bar to any suit by him on the contract. For this doctrine, urged by the respondent, the court relied principally on the Massachusetts case of *Sipley* v. *Stickney*, 190 Mass. 43 (1906).

In *Sipley* v. *Stickney*, a resident of New York owning a farm in Sheffield, Massachusetts, hired the plaintiff to run the farm for him. It was alleged in the answer (being set up as an affirmative defense, as required by Massachusetts law) that—

> "the plaintiff in his monthly accounts had intentionally misstated the debts in running the farm to deceive the defendant."

The court held that, if this was true, the plaintiff was entitled to recover no wages. The court said:

> "We are of opinion that a wilful default in the performance of a stipulation not going to the essence of the contract bars a recovery . . . Where the plaintiff has honestly tried to perform his contract, it is one thing to hold that it must have been the intention to make the commission of such a breach a condition precedent. But where the default is wilful the question in our opinion is a different one."

The actual decision in *Sipley* v. *Stickney* need not be seriously questioned. It is quite clear that the court had before it a case in which the breach was (*a*) substantial, and (*b*)

not only intentional, but fraudulent and in bad faith. The plaintiff was suing for wages, and the performance of services was of course a condition precedent to the recovery therefor. The rendering of reports by the plaintiff was a part of his services. The dishonest reports not only were a breach of the essential obligation of fidelity (2 Williston, Contracts, sec. 1022; *Peterson* v. *Mayer*, 46 Minn. 468 (1891), but colored the entire performance of the plaintiff's service with dishonesty and rendered fundamental certain breaches which if innocent might have been regarded as unimportant.

The Massachusetts court did not, we believe, intend to lay down a general doctrine that every wilful breach of a stipulation, however remote and subsidiary, bars recovery upon the principal obligation of the contract, regardless of the accepted rules of dependent and independent covenants and regardless of the facts of the particular case. And subsequent Massachusetts decisions bear out this belief, for the court which decided *Sipley* v. *Stickney* understands it to apply only to cases where the breach is substantial:

> "The defendant contends that the plaintiffs by their wilful default have lost their rights under the contract . . . This rule rests upon an intentional departure or wilful default in the performance of a *substantial* stipulation of the contract. *Sipley* v. *Stickney.*"
>
> *Cobb* v. *Library Bureau*, Adv. Shs. 1733 (1929).

Or in bad faith:

> "That is in substance an agreement that he acted *in good faith*, and for that reason this case does not come within *Sipley* v. *Stickney.*"
>
> *Maloon* v. *Barrett*, 192 Mass. 552, 554 (1906).

And at the risk of repetition we point out again that the Massachusetts court had before, and has since, applied the

doctrine of *Boone* v. *Eyre* and apparently does not regard *Sipley* v. *Stickney* as contrary to these decisions.

See *Mill Dam Foundery* v. *Hovey*, 21 Pick. 417, 439, *supra*.

*Knight* v. *The New England Worsted Co.*, 2 Cush. 271, 286 (1848).

*Cavanaugh* v. *Tyson*, 227 Mass. 437 (1917).

If, nevertheless, the language of the Massachusetts court in *Sipley* v. *Stickney* is to be taken as laying down a general doctrine that every wilful breach of a stipulation, however remote and subsidiary, bars recovery upon the principal obligation of the contract, we maintain that the doctrine is erroneous, and should not be adopted as a part of the general commercial law of the Federal courts.

Such a doctrine runs counter to the long list of decided cases cited at pages 56 to 59 of this brief, *supra*. In all of these cases defining the rules of dependent and independent agreements, no mention is made of the wilfulness or lack of wilfulness of the plaintiff's breach. The point considered is whether such breach was substantial, whether it went to the root of the contract, or whether it was collateral, going merely to a part of the consideration, and could be compensated for in damages. In all of the cases in which the plaintiff's breach is held not to have gone to the essence of the contract, the next logical inquiry under the Massachusetts rule for which the respondent contends should have been whether the breach was wilful. Yet in none of the cases cited does the court suggest such an inquiry or intimate that such fact, if found, would have produced a different result.

On the contrary, with full recognition of the state of facts where a party has by his deliberate act broken or incapacitated himself from performing a minor promise of the contract, courts and textwriters alike hold that the obligation

of the other party is not discharged or its non-performance excused by proof of the breach by the plaintiff. Thus, the court said in *Barker & Stewart Lumber Co.* v. *Edward Hines Lumber Co.*, 137 Fed. 300 (1905), at p. 308:

> "The promisor may by his voluntary, wrongful act wholly and absolutely disable himself from performing a severable part of the contract. But such act is not intended to excuse performance of other parts of the contract, and does not go to the whole consideration, scope, or purpose of the contract, nor render unattainable its main object."

See also—

*Mayo* v. *American Malting Co.*, 211 Fed. 945 (1914, 4th C.C.A.).
*Carpenter* v. *Cresswell*, 4 Bing. 409 (1827).
*Stavers* v. *Curling*, 3 Bing. N.C. 355 (1836).
And see Page, Contracts, sec. 2915.

The doctrine announced by the Court of Appeals in this case is in fact an unwarrantable importation from the law of quasi-contracts, by which a plaintiff, like a builder under a building contract who has failed to build the building precisely as called for by the specifications, is permitted to recover on a *quantum meruit* provided his performance has been substantial and in good faith. *Homer* v. *Shaw*, 177 Mass. 1 (1900).

The rule of quasi-contracts is correctly referred to and defined by Judge Hand in *Susswein* v. *Pennsylvania Steel Co.*, 184 Fed. 102, 108 (1910), as follows:

> "Where one party has performed a part of an obligation and without excuse refuses to complete the performance which as a whole is a condition precedent, he may not sue in the common counts on a quantum meruit

for what he has done. The rule has absolutely no application where the performance is not a condition precedent to the express obligation arising under the contract, and it merely decides that the party who has received the performance may in good conscience keep it, in view of the other party's wilful default."

No such doctrine should be applied where the plaintiff is seeking to recover upon the principal obligation of an express contract, has fully performed everything required of him at the time of the defendant's breach, and has failed merely in the subsequent performance of a subsidiary stipulation going only to a small part of the consideration.

D. Upon the Facts of This Case, the Foregoing Principles Require a Ruling that Petitioner's Detention of the Drums was Not a Good Defense to This Action.

On analysis of this case, one must inevitably conclude that *it was the primary intention of the parties to buy and sell a quantity of Prime A fish oil* at a stated price per gallon, and *the provisions for delivery in drums and return of the drums were ancillary to this main purpose.* Of necessity, this latter provision could not be performed until some time after the purchase and sale was completed. The petitioner's breach therefore concerns only a collateral and ancillary provision of the contract which in no way touches the heart of the consideration and which, necessarily performed some time later than the main covenants, must be regarded as independent of them.

The case at bar obviously falls within the long line of authorities of which *Boone* v. *Eyre* stands at the head. The breach by the petitioner not only could be, but actually was, compensated in damages awarded in the companion case brought by the respondent, which case went to judgment on June 25, 1928 (R. 75). It is suggested, moreover, that re-

spondent's declaration in failing to allege performance of the contract on its part (see Declaration, Exhibit "F," R. 78) shows the natural interpretation that it then placed on the stipulation for the return of the drums, namely, that such stipulation was an independent promise, severable from the rest of the contract and compensable in damages.

The applicability of *Boone* v. *Eyre* being fully established, the only remaining question is whether the detention could be ruled as a matter of law to be such a substantial breach that in all justice and fairness it must be held to bar the petitioner's right of action for respondent's clearly material antecedent breach in delivering goods worth about half the value of those called for in the contract. Aside from the fact that it is rarely possible to rule on the substantiality or materiality of a breach as a matter of law, except in obviously flagrant cases, such question being properly for the jury—

> See 2 Williston, Contracts, sec. 866;
> *Montreal Cotton &c. Co.* v. *Fidelity &c. Co.*, 261 Mass. 385, 391 (1927)—

the impossibility of such a ruling in this case admits of no doubt, in view of the insignificance of petitioner's breach in comparison with the size of the transaction involved and the magnitude of the respondent's breach. The transaction involved the sale of $18,000 worth of oil; the respondent's breach has been assessed at $10,700; the petitioner's breach has been assessed at $100.

If the question of the good faith of the Young Company is at all material to the application of the principles of law already discussed, the action of the Young Company was clearly not in bad faith. It clearly was not fraudulent. The failure to return the drums was in the same category as the failure to bring in emigrants (*Emigrant Co.* v. *County of Adams*); the failure to extend the railroad to the mine in *Central Appalachian Company* v. *Buchanan, supra;* the

failure to turn over the securities in *Kauffman* v. *Raeder, supra;* the failure to purchase the coal in *Ainesworth Coal & Iron Co.* v. *Grangesberg Oxelosund, supra,* and the failure to honor orders sent by the agents in *Mark* v. *Stuart-Howland Co., supra,* none of which was held sufficient to bar the plaintiff's right to action.

## III.

**Even if a Wilful Breach of an Independent and Ancillary Provision of a Contract should be Held to Bar Recovery, the Facts of This Case do Not Bring it within This Rule.**

It has already been pointed out that the wilfulness of a plaintiff's breach may be relevant in determining whether the breach was substantial; but that, if the breach, in spite of its wilfulness, is still unsubstantial, it is no defense. The Circuit Court of Appeals, however, adopted the rule that any wilful breach, regardless of whether it was substantial or went to the essence of the consideration, constituted a defense. We now assume for purposes of argument that this rule is a correct one, and proceed to demonstrate that, even upon this assumption, the facts of this case do not bring it within the rule.

The drums in question were retained by Frank L. Young Company until September 15, 1922, and then were attached by the sheriff in the first action of *Frank L. Young Company* v. *McNeal-Edwards Company.* The ruling in the first opinion of the Circuit Court of Appeals was that the detention up to September 15, 1922, constituted a wilful breach. This conception originated with the Circuit Court of Appeals. The respondent's counsel had argued, and presumably still contends, that the attachment on September 15 constituted a wilful breach. These two contentions will now be considered.

A. The Record Discloses No Evidence upon Which the Jury could Find, Much Less be Compelled to Find, that the Petitioner's Breach was Wilful or Intentional.

The original opinion of the Circuit Court of Appeals ruled that the detention of the drums to September 15 was wilful, and required a directed verdict for the defendant. It should be observed that by this ruling the court below declared not only that the jury could find that the breach was wilful, but on the evidence must have so found. The defendant made no request for instruction asking that the jury be permitted to pass upon the intentional nature of the breach. Its only requests for instruction were requests for peremptory direction of a verdict. We submit that the ruling of the court below was based upon the assumption of a state of facts entirely unwarranted on the record before it.

Whether an alleged breach of contract is substantial, and whether it is wilful or merely negligent, are questions of fact peculiarly within the domain of the jury.

*Montreal Cotton &c. Co.* v. *Fidelity &c. Co.*, 261 Mass. 385, 391 (1927).

Now there is no finding by the jury that the detention of the drums was a wilful breach. Under the issues arrived at on the pleadings of *McNeal-Edwards Company* v. *Frank L. Young Company*, certain questions were submitted to the jury: (1) whether the retention of the drums "from the time when they were received (about January 28, 1922) to 15 September 1922, when they were attached" was "an unreasonably long detention of them; and (2) if so, what money damage was sustained. The jury answered "Yes" to question 1 and "$100" to question 2. Certainly nothing in these answers—if they can properly be considered in this case at all—could be construed as a finding of wilfulness.

Likewise, the only two questions arising on the pleadings of this case—whether the oil was of the quality and grade required by the contract and what the damages were—were submitted to the jury for special findings, and both were found in favor of the plaintiff (R. 14).

The proof relating to the retention of the drums is meagre and inextricably bound up with that dealing with the viscosity of the oil. But, at the risk of tediousness, counsel have attempted to restate in *Appendix A*, at the end of this brief, all the evidence dealing even remotely with this point of the case, with full confidence that the Court, after reviewing the case thus presented, will decide that the jury could not be permitted to find the detention of the drums a wilful breach, much less be required so to find.

This evidence shows that the oil was received in January, but was not dumped from the drums until summer, because its viscosity prevented dumping until hot weather. It is also apparent that the officers of Frank L. Young Company quite reasonably wanted the oil kept in the original containers until the controversy as to its quality had been settled, so that no question of identity of the oil could arise.

It is obvious that the jury's finding that the drums were detained unreasonably long is based on the unexplained fact that, while the drums were gradually emptied during July and August, they remained still in the buyer's possession in the middle of September. The mere failure to explain this continued possession did not, however, and could not warrant the conclusion that such continued possession was a wilful default under the contract.

It follows, therefore, that there was no basis for the assumption by the Circuit Court of Appeals that the breach was wilful, and that in rendering its decision predicated upon such an assumption the said court committed grave error.

B. The Attachment of the Drums on September 15, 1922, was Not a Breach of Contract by Petitioner.

In the Circuit Court of Appeals counsel for the respondent argued, and presumably still contends, that the action of Frank L. Young Company in having the sheriff attach the drums on September 15, 1922, was a breach of the contract to return the drums in a reasonable time. Of course, if this was a breach at all, it was an intentional breach. But the short answer is that such attachment was no breach of the contract. General Laws, c. 223, sec. 42, provides that "all real and personal property liable to be taken on execution may be attached upon the original writ." It was in exercise of this statutory right that Frank L. Young Company, a creditor of McNeal-Edwards Company to the extent of $10,700, attached the drums in question. The respondent suggests that by virtue of the contract now before this Court Frank L. Young Company is barred from the rights of attachment which any other creditor of McNeal-Edwards Company would have. Can it be that Frank L. Young Company, with an execution for over $10,000, would be unable to satisfy its judgment out of this property? It would hardly seem that a court should so hold in the absence of binding authority. And the statute expressly provides that if execution could be levied on the property, it can be attached. It is submitted that the District Court properly held that the exercise by the plaintiff of its rights of attachment could be no breach of the contract.

It is further submitted that this question does not arise *de novo* between these parties in this proceeding. *It has already been adjudicated* in the suit of *McNeal-Edwards Company* v. *Frank L. Young Company.* The declaration in that action appears on page 78 of the record. In count 1 McNeal-Edwards Company, after setting forth the contract, declares "that it was a part of the defendant's obligation under the contract for said sale forthwith to remove the oil from said drums and to return the latter, freight prepaid, to

the plaintiff at said Reedsville; but the plaintiff has refused and neglected and still refuses and neglects to return said drums to the plaintiff as aforesaid to the great damage of the plaintiff as set forth in its writ." This action of McNeal-Edwards Company to recover for Frank L. Young Company's failure to return the drums was tried together with the action now before the Court (R. 17). Judge Morton's charge in the District Court (R. 67-71) declared that Frank L. Young Company's breach, if any, consisted in the retention of the drums an unreasonably long time to September 15, and not the attachment of the drums on September 15. Upon this charge the jury returned a verdict for McNeal-Edwards Company in the sum of $100, and the case went to final judgment on June 25, 1928, as was above stated (R. 75). It therefore appears that the precise question has been before a court of competent jurisdiction in litigation between these parties, and that a final judgment has been rendered that Frank L. Young Company broke its contract by retaining the drums an unreasonably long time up to September 15, but did not break it by attachment of the drums on September 15. Consequently, it is *res judicata* that the attachment of September 15 was no breach of the contract by Frank L. Young Company.

## IV.

### No Error is Disclosed in the Other Rulings of the Trial Court of which the Respondent Complains.

The respondent's assignments of error Nos. 1, 2, and 3 (R. 83) in the court below were based on the jurisdictional question covered by pages 5 to 43 of this brief. Assignments Nos. 4, 7, and 8 (R. 83-84) were based on the proposition that this action was barred by the petitioner's detention of the drums and are covered by pages 43 to 70. The remaining assignments (Nos. 5, 6, and 9) are of relatively minor importance, and although they were not pressed by respon-

dent in the court below, we here consider them for the sake of completeness.

A. Assignment of error No. 5 is based on the court's denial of the requested ruling that "the plaintiff accepted the oil delivered under the contract in suit." Such a request was totally immaterial to the issues raised in this case. The plaintiff never contended that the oil had not been accepted within the definition of the Uniform Sales Act which is in force in both Maryland and Massachusetts (Mass. General Laws, chapter 106; Maryland Code, article 83). Under the Sales Act, questions of acceptance arise only in case a buyer is seeking to rescind the contract or to refuse to receive the goods. In the present case the buyer received the goods, accepted them, and seeks to recover damages for breach of warranty. Acceptance of the goods has no effect upon the right of the buyer to recover damages for breach of warranty:

> "In the absence of an expressed or implied agreement of the parties, acceptance of the goods by the buyer shall not discharge the seller from liability in damages or any other remedy for breach of any promise or warranty in the contract to sell or the sale."

See Uniform Sales Act, sec. 49.
Mass. General Laws, c. 106, sec. 38.
Maryland Code, art. 83, sec. 70.

Such was also the common-law rule in many American states, including Maryland and Massachusetts.

See 2 Williston, Sales, sec. 488.

B. Assignment of error No. 6 is the refusal to rule that there was no evidence that the plaintiff made known to the defendant the purpose for which the oil was to be used, and that the plaintiff cannot recover under the third count of its declaration. This request, although not given in terms, was adequately covered by the judge's charge. The only differ-

ence between recovery on the first count of the declaration (based upon breach of express warranty) and recovery on the third count (based upon breach of implied warranty of fitness for a particular purpose) is in the measure of damages. The court correctly instructed that the amount of recovery was the measure of damages under the first count, viz., the difference between the value of the goods delivered and the value of the goods contracted for, and that the question for the jury on the issue of liability was solely whether the oil delivered was Prime "A" Menhaden Oil (R. 65). It may be mentioned that respondent expressly waived this assignment of error in its first brief.

C. The last assignment of error (No. 9) was based on the proposition that the judgment of Thompson and Gascoyne was conclusive on the parties as to the grade and quality of the oil, and that no evidence could be admitted on this subject.

It is sufficient answer to quote from the contract and the trial judge's oral statement in ruling such evidence admissible. The contract of sale provides that—

> "Oil to be gauged and sampled by George A. Thompson at time of shipment. If Gascoyne and Company's test of sample drawn by George A. Thompson at time of gauging shows free fatty acid in excess of 5%, sellers to make customary allowance to buyers for each One Per cent, or fraction thereof, above 5% Free Fatty Acid."

(The "purchase order" and "broker's note" differ slightly in their phrasing, but reach the same result (R. 18). And Judge Morton, overruling respondent's objection to the evidence, said:

> "Well, it lies in my mind this way: that the suggestion is that the contract removes any point of doubt or debate about the quality of goods shipped because the contract appoints a certain person as arbitrator, to de-

cide that question once and for all. Now, it is quite clear that if a term of that sort is intended to be inserted in the contract it should be put in there clearly so that it is there for anybody to read and see. I don't think this contract means that test at all. It does say, *as to acidity,* that Gascoyne's test is to be accepted by the parties and adjustment is to be made on the basis of it. Beyond that, it says that the oil is to be gauged and sampled by Thompson, but there is no statement that the grading is to be accepted by the parties as Thompson's grading, or anything equivalent to that" (R. 21).

It is the position of the petitioner (1) that the duties of Thompson were limited to measuring and taking a sample of the oil, and that he had no duty with regard to determining its grade or quality; (2) that the duties of Gascoyne involved testing the oil *for acidity,* and that he had no duty to determine whether the oil was of Prime "A" grade or any other grade or quality; (3) that neither Thompson nor Gascoyne, in fact, performed tests or rendered judgments beyond the duties just set forth; (4) that the clear language necessary in a contract to appoint a third person as arbitrator of all questions of grade and quality is missing from this contract. Consequently, it is submitted that there is no merit to this assignment of error.

## THIS COURT SHOULD CONSIDER ALL QUESTIONS AND FINALLY DISPOSE OF THIS LITIGATION.

If this Court rules that the Circuit Court of Appeals was in error in its opinion that General Laws, chapter 227, sections 2 to 4, are inapplicable in the Federal courts of Massachusetts, we urgently press upon the Court the desirability of considering the other questions discussed in this brief in order that this litigation may be finally disposed of at this time.

There is no question as to the *power* of this Court to consider all questions and finally dispose of the case rather than to remand it to the Circuit Court of Appeals for further decision.

> "We have power to render such judgment as the Circuit Court of Appeals should have rendered, or we might reverse the judgment of affirmance by that court and send the case back to it to decide the question of jurisdiction which it had refused to pass on. We think it would be unnecessary hardship to the plaintiff to do the latter because of the further delay that would thereby be caused. The accident occurred in 1901 . . . and at this time, nearly seven years after the injury, the plaintiff has not yet been paid the amount of his judgment."
>
> *Boston & Maine R.R.* v. *Gokey*, 210 U.S. 155, 162 (1908).

> "In the circumstances it is open to us to deal only with the matter considered by the Circuit Court of Appeals and to remand the cases to it for any needed action upon other questions, or to proceed ourselves to a complete decision. The latter course seems the better inasmuch as counsel have united in presenting to us all questions thought to arise upon the record and the litigation already has covered a considerable period."
>
> *Cole* v. *Ralph*, 252 U.S. 286, 290 (1919).
> *Lamar* v. *United States*, 241 U.S. 103 (1916).

For several reasons it is submitted that this Court should exercise its discretion in favor of final disposition at this time:

(1) This litigation has already lasted too long. The contract which forms the basis for the action was made in January, 1922 (R. 18). The first suit with reference thereto was

commenced in September of 1922. The jury's verdict in this suit was rendered on February 10, 1928 (R. 71). Nine years have elapsed since the transaction; more than three years since the trial and verdict for the petitioner.

(2) The cost of appellate proceedings is already too large considering the amount involved. Proceedings before this Court constitute the third oral appellate argument in the case, and involve the fifth brief presented on behalf of the petitioner.

(3) But of foremost consideration is the fact that the matter of contract law involved on the merits is one which would itself appropriately form the basis for a petition for certiorari to this Court however the Circuit Court of Appeals might decide it. By reference to the first opinion of the Circuit Court of Appeals (R. 86-89) the Court will observe that in spite of an overwhelming number of contrary decisions in other circuits and in England, and on the basis of *Sipley* v. *Stickney*, a Massachusetts case inapplicable on the facts, the court below ruled that the plaintiff's breach of contract to the extent of $100 wholly incapacitated it from recovering for the breach of the defendant in the amount of $10,700. The fallacies involved in that opinion are fully considered *supra*, pages 43 to 66. Suffice it to say that it is apparent that an important question of the general commercial law of contracts is involved, upon which the losing party under another decision of the Circuit Court of Appeals would unquestionably seek review by this Court. In view of this circumstance it would seem quite appropriate that the Court should undertake complete disposition of the case at this time.

Respectfully submitted,

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## APPENDIX A.

### Collection of Evidence re Detention of the Drums.

*Testimony of Cedric F. Lee* (R. 22):

"The oil was pressed several months later, in July or August, 1922. It had been received the latter part of January. We attempted to dump it from the drums during the winter months. We first attempted to take the oil from the drums in July or August because in the first place there was a dispute between the sellers and the purchasers, and the instructions were to hold off until some settlement had been reached, . . . and in the second place it would have been impossible to do so in cold weather. . . . I observed it being dumped from the drums in July and August, 1922. In the summer time it takes from one to five minutes and in the winter it takes from five to ten minutes to dump a drum of Prime A Menhaden Oil. I should say it took half an hour to dump this and some went even an hour or an hour and a half."

*Same witness* (R. 25):

"Drums were kept in the yard for three or four weeks in the sun before they were poured, in July and August."

*Testimony of Albert Sears* (R. 26):

"I first saw the oil in July or August in the chilling-room."

*Testimony of William B. Schutt* (R. 27):

"I had to do with dumping that oil. I think that Mr. Lee's description is just right. It was dumped in warm weather, in the summer of 1922."

*Testimony of Percy L. Young* (R. 30):

"We complained at several times during the controversy we had with them. It was strung out over a period of months, I believe."

*Same witness* (R. 31):

"After we had actually dumped the entire lot, we found it very difficult to work. It didn't act like any other oil we had in the plant, but we didn't know that at the time of the original complaint, shortly after the arrival of the stuff, because we didn't have occasion to dump it or work it through our presses."

*Same witness* (R. 32):

"The drums are piled in the back yard of Frank L. Young & Company."

*Excerpt from Plaintiff's Exhibit 7*, a letter from Frank L. Young Company to McNeal-Edwards Company, dated June 10, 1922 (R. 32, 33):

"Inasmuch as we have been requested several times by Messrs. Reilly-Edwards Co. to return the 1107 drums (which you shipped us) when emptied, we feel that we should let you know just how the matter stands.

"The facts of the case are that the oil contained in the drums is so thick that it is almost impossible to empty them. We naturally felt that with the advent of warm weather the oil would become perfectly limpid and empty out readily, because we have never had any oil before but would thin out in warm weather and become in a measure workable. . . .

"Mr. Edwards of Reilly-Edwards Co. was in Boston a few days ago, and at our request he visited our factory and looked over the goods and watched our men trying

to empty a few drums. . . . . we feel that you owe it to us to send one of your concern or one of your representatives to visit us and see for yourselves that conditions are absolutely as we state."

*Excerpts from Plaintiff's Exhibit 8,* a letter from McNeal-Edwards Company to Frank L. Young Company, dated June 20, 1922 (R. 34):

"Their (*sic*) is no need of us sending a representative to your place to see the oil, we expect you to ship the drums as soon as possible."

*Testimony of John L. Rounsevell* (R. 34):

"Employed by Frank L. Young Company in the summer of 1922, after July 15th, as assistant to the superintendent, Mr. Lee. I saw, I think, about thirty-five or forty drums of McNeil-Edwards oil dumped. I went away about the middle of August. I noticed that the oil was very thick for oil to be at that time of the year."

*Testimony of Cedric F. Lee, recalled* (R. 39):

"I have testified that the oil was leaking from these drums in February, and that when I saw them in August it would not flow freely, that is, without the aid of stirring or agitation."

*Excerpt from Defendant's Exhibit A,* letter Reilly-Edwards Company to Frank L. Young Company, dated April 22, 1922 (R. 80):

"Dear Sirs:

"We have received a letter from the McNeal-Edwards Company reading,—

" 'In regard to the drums that this lot of oil was shipped in, they were to be returned in a reasonable

time, and we think they have had time enough to dump them so please get after them to ship the drums back to us.' "

*Excerpt from Defendant's Exhibit 3*, letter Frank L. Young Company to Reilly-Edwards Company, dated July 12, 1922 (R. 80):

"In regard to empty drums for McNeal-Edwards Co., as mentioned in your letter of 7th inst., would say that as advised by phone we are not in a position to furnish the drums until they are empty, and we do not feel like emptying the drums until after McNeal-Edwards have had an opportunity to see for themselves in the original packages the kind of oil they shipped us.

"We hope we can get them to be reasonable and come up and see the goods as we requested. It certainly is not fair to make us hold the goods any longer than we have."

*Excerpt from Defendant's Exhibit 2*, letter McNeal-Edwards Company to Frank L. Young Company, dated July 19, 1922 (R. 81):

"We have been waiting very patiently for you to return our 1107 drums that we shipped you Jan. 18th but it seems that you have made no attempt to do so, we are sorry to have to keep after you about this matter as it is embarrassing to have to do business in this way, but we must have our drums as we need them to ship our oil now and if you cannot ship all ship what you can, please advise when and how many you will ship."

*Excerpt from Defendant's Exhibit 1*, dated August 22 (R. 81):

"Have you shipped any of our drums if not when and how many."